TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1[redacted] 1917

No. [redacted] 349

THE CONTRIBUTORS TO THE PENNSYLVANIA HOSPITAL, PLAINTIFF IN ERROR,

vs.

THE CITY OF PHILADELPHIA ET AL.

IN ERROR TO THE SUPREME COURT OF THE STATE OF PENNSYLVANIA.

FILED DECEMBER 28, 1918.

(20,867)

(25,667)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1916.

No. 837.

THE CONTRIBUTORS TO THE PENNSYLVANIA HOSPITAL, PLAINTIFF IN ERROR,

vs.

THE CITY OF PHILADELPHIA ET AL.

IN ERROR TO THE SUPREME COURT OF THE STATE OF PENNSYLVANIA.

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1 C. P. No. 5, December Term, 1915.

No. 2883.

THE CONTRIBUTORS TO THE PENNSYLVANIA HOSPITAL
vs.
CITY OF PHILADELPHIA, THOMAS B. SMITH, Mayor; GEORGE E. DATESMAN, Director; WILLIAM H. CONNELL, Chief.

Docket Entries.

2883.

Roberts, Montgomery & McKeehan.
Biddle, Paul & Jayne.
John P. Connelly.

Jan. 25, 1916.
Jan. 18, 1916—Typewritten and Printed Bill filed.
Eo Die—Rule to appear and to answer filed.
Jan. 25, 1916—Printed Bill filed.
Feb. 2, 1916—Answer to Bill of Complaint filed.
Jan. 25/16—Service accepted on Bill filed.
Bill in Equity.
Filed Jan. 18, 1916.
Mar. 17, 1916—Findings of Fact and conclusions of law dismissing Bill at the cost of Plaintiff filed.
March 20, 1916—Plaintiff's exceptions to findings of fact and conclusions of law filed.
March 24, 1916—Exceptions and Bill dismissed. Pl'ff for costs. (Seal.) See final Decree filed.
Ap'l 11, 1916—Certiorari from S. C. as of January Term, 1916, No. 155, &c., brought into office.
Certified from the Record this 14th day of April A. D. 1916.

R. M. SNYDER,
Pro Proth'y.

2 In the Court of Common Pleas No. —, of Philadelphia County, — Term, 1915. No. —.

In Equity.

THE CONTRIBUTORS TO THE PENNSYLVANIA HOSPITAL

v.

THE CITY OF PHILADELPHIA, THOMAS B. SMITH, the Mayor; GEORGE E. DATESMAN, the Director of the Department of Public Works; and William H. Connell, the Chief of the Bureau of Highways, of Said City.

Bill in Equity.

To the Honorable the Judges of said Court:

Your orator complains and says:

First. That your orator is a corporation organized and existing under the laws of the Commonwealth of Pennsylvania, and engaged in maintaining and operating a hospital, known as the Pennsylvania Hospital.

3 Second. That your orator is the owner in fee of a certain lot or piece of ground, situate in the Twenty-fourth Ward of the City of Philadelphia, bounded on the north by Haverford Avenue, on the east by Forty-second Street, on the west by Forty-ninth Street, and on the south by Market Street and Powelton Avenue.

Third. That since January 1, 1841, your orator has maintained and does now maintain a department for the care of insane patients, and has erected thereon for the said purpose many and valuable buildings and improvements. At the present the number of patients cared for is 371; many of whom are charity patients.

Fourth. That your orator bought said property on June 22, 1836, and has ever since that time been the owner thereof.

Fifth. That on February 2, 1854, a committee, appointed by the Managers of the Pennsylvania Hospital, presented a memorial to General Assembly of the Commonwealth of Pennsylvania, sitting at Harrisburg, remonstrating against the opening of any streets, lanes or alleys through said lot or piece of ground on which said Insane Department was then situated.

Sixth. That as a result of said memorial the following act (P. L. 385) was passed by the General Assembly of the Commonwealth of Pennsylvania; Act of April 17, 1854:

"Section 1. Be it Enacted that no streets, alleys, roads or lanes shall ever be opened through the property belonging to the corporation of the Contributors to the Pennsylvania Hospital, Situate in the Twenty-fourth Ward of the City of Philadelphia, without the consent of the said corporation, so long as the said property is used for the purposes of their Insane Department, any law to the

4 contrary notwithstanding: Provided. That said corporation shall contribute one-half the ground for an avenue on their

East, and one on their West line, each one hundred feet in width, without charge to the City and County of Philadelphia."

Seventh. The provisions of said act were accepted by a resolution of your orator on May 2, 1854, as follows:

"Whereas by an Act of Assembly passed the 17th day of April, A. D. 1854, it has been enacted and declared that no streets, alleys, roads or lanes shall ever be opened through the property belonging to the corporation of the Contributors to the Pennsylvania Hospital situate in the Twenty-fourth Ward of the City of Philadelphia without the consent of the said corporation so long as the said property is used for the purposes of their Insane Department, any law to the contrary notwithstanding. Provided that the said corporation shall contribute one-half the ground for an avenue on their east and one on their west line each one hundred feet in width without charge to the City and County of Philadelphia.

"Now therefore be it resolved by the Contributors to the said Pennsylvania Hospital assembled at their stated annual meeting that they do hereby accept the terms and conditions of the said Act of Assembly and in consideration of the privileges and immunities thereby granted and conferred upon them do hereby devote and dedicate and whenever required by the proper authorities and without any charge to the said city and county will throw out and dedicate to public use as a highway fifty feet of ground along the whole Eastern line and fifty feet along the whole Western line of their property situate in the Twenty-fourth Ward of said City of Philadelphia as one-half of the ground for two avenues each one hundred feet wide according to provisions of the Act of Assembly aforesaid.

"Resolved that the Board of Managers be directed to transmit copies of the foregoing resolution to the Governor of this Commonwealth and to the Commissioners of the County of Philadelphia."

Eighth. In conformity with such resolution, and as consideration for the provisions of said act, exempting said property from the opening of any streets through it, without the consent of the owner thereof, your orator by proper Deeds of Dedication, delivered and conveyed to the City of Philadelphia, and dedicated to the public use two strips or pieces of ground for the eastern and western
5 boundaries of said lot, in accordance with the terms of the aforesaid act, providing for said dedication, which land was duly accepted by said city, and is now held and occupied by it.

Ninth. That the following ordinance was passed by the Select and Common Councils, and approved by the Mayor, of the City of Philadelphia, on December 18, 1913:

"Section 1. The Select and Common Councils of the City of Philadelphia do ordain, That the Department of Public Works be authorized and directed to notify the owners of property over and through which Forty-fourth street, from Market street to Haverford avenue, will pass, that at the expiration of three months from the date of said notice said street will be required for public use.

"Sec. 2. The Mayor of the City is hereby authorized and directed to enter security, on behalf of the City of Philadelphia, for the payment of any damages which may be assessed by reason of the

opening of said street; upon the filing of said bond, and at the expiration of the said three months, the Director of the Department of Public Works shall forthwith proceed to open said street."

Tenth. That on January 27, 1914, your orator was notified by the Chief of the Bureau of Highways, that said Forty-fourth Street would be opened for public use from Market Street to Haverford Avenue, at the expiration of three months from the date of the notice, under said ordinance.

Eleventh. That your orator was further duly notified by the City Solicitor, that the Court of Quarter Sessions had granted a rule to show cause why the City of Philadelphia should not have leave to file its bond in such sum as the Court may direct, to secure the payment of any damages which may be awarded by reason of the opening of Forty-fourth Street from Market Street to Haverford Avenue, and upon the filing of security in the Court, the said City, by its proper officers, to enter upon and immediately open
6 the said streets to public use between the points named, said rule being made returnable on Monday, April 26, 1915, at 10 o'clock A. M.

Twelfth. That said ordinance was passed and said proceedings are being taken under the act of the Commonwealth of Pennsylvania of June 8, 1881 (P. L. 68), which is declaratory of the Act of May 23, 1874 (P. L. 235), and which provided as follows:

"Section 13. That the municipal authorities and courts having jurisdiction in any city of this commonwealth, shall have exclusive control and direction of the opening, widening, narrowing, vacating and changing grades of all streets, alleys, and highways within the limits of such city, and may open or widen streets, at such points, and of such width, as may be deemed necessary by such city authorities and courts, any private or special statute to the contrary notwithstanding; proceedings to be had in such cases as are now required by law. Streets commenced under any special authority shall be completed unless otherwise decided by councils; and any of said cities may, with the consent of the courts of quarter sessions of the proper county, enter security for damages to private property by reason of street improvements, in such sum or sums as the said courts may direct."

Thirteenth. That said acts do not empower the City of Philadelphia to take by eminent domain the right and privilege granted your orator by the Act of April 17, 1854, aforesaid, providing that no streets shall be laid out through the said lot without your orator's consent.

Fourteenth. That said ordinance and the proceedings thereunder are void and illegal, in that they constitute a violation of Article 1, Section 18, of the Constitution of the Commonwealth of Pennsylvania, which provides as follows:

"No ex post facto law, nor any law impairing the obligation of contracts or making irrevocable any grant of special privileges or immunities, shall be passed."

7 Fifteenth. That said ordinance, and the proceedings thereunder, are void and illegal, in that they constitute a violation

of Article 1, Section 10, of the Constitution of the United States, which provided as follows:

"1. No state shall enter into any treaty, alliance, or confederation; grant letters of marque and reprisal; coin money; emit bills of credit; make anything but gold and silver coin a tender in payment of debts; pass any bill of attainder, ex post facto law, or law impairing the obligation of contracts, or grant any title of nobility."

Sixteenth. That no offer to return the consideration paid by the Contributors to the Pennsylvania Hospital upon the execution of said contract, and the money expended by them in consequence of the privileges secured under its terms has been made; nor has any notice been given to the said Contributors to the Pennsylvania Hospital of an intention upon the part of the said city or state to rescind the said contract as required by law.

Seventeenth. That your orator will suffer great and irreparable damage by the opening of Forty-fourth Street through the lot of your orator as aforesaid.

Wherefore, your orator, needing equitable relief prays that the City of Philadelphia, Thomas B. Smith, the Mayor, George E. Datesman, the Director of the Department of Public Works, and William H. Connell, the Chief of the Bureau of Highways, of said city, their servants, agents and employees be forever enjoined from opening Forty-fourth Street through the land of your orator, 8 from Market Street to Haverford, as aforesaid, and that such other and further relief be granted your orator as the circumstances may require.

And they will ever pray.

ROBERTS, MONTGOMERY & McKEEHAN,
OWEN J. ROBERTS,
J. RODMAN PAUL,
BIDDLE, PAUL & JAYNE,
Solicitors.

CITY AND COUNTY OF PHILADELPHIA, *ss:*

T. Wistar Brown, being duly affirmed according to law, deposes and says that he is president of The Contributors to the Pennsylvania Hospital, and that the facts set forth in the foregoing bill of complaint are true to the best of his knowledge, information and belief.

[SEAL.] T. WISTAR BROWN,
President.

Affirmed and subscribed before me this 18th day of January, A. D. 1916.

[SEAL.] RUTHERFORD S. BATES,
Notary Public.

Commission Expires Jan'y 21, 1917.

Endorsement: Dec. Term, 1915. C. P. No. — No. 2883, — Term 191-. In the Court of Common Pleas No. 5, for the County of Philadelphia. In Equity. The Contributors to the Pennsylvania Hospital v. The City of Philadelphia, Thomas B. Smith, the Mayor; George E.

Datesman, the Director of the Department of Public Works, and William H. Connell, the Chief of the Bureau of Highways, of Said City, Bill in Equity. To the within-named Defendants: You are hereby notified and required, within fifteen days after service hereof on you, to cause an appearance to be entered for you in the above Court, and to file your Answer within thirty days to the within Bill of Complaint of the within The Contributors to the Pennsylvania Hospital, and to observe what the said Court shall direct. You are also notified that
if you fail to comply with the above directions by not enter-
9 ing an appearance in the Prothonotary's Office within fifteen
days, and file your Answer within thirty days, you will be liable to have the Bill taken pro confesso, and a decree made against you in your absence.

Witness our hands at Philadelphia, this 18th day of January, A. D. 1916. Roberts, Montgomery & McKeehan, Owen J. Roberts, J. Rodman Paul, Biddle, Paul & Jayne, Solicitors. International, 236 Chestnut St., Philadelphia. Filed Jan. 18, 1916. B. Richardson, Pro Prothy. Pd. 3.50.

Endorsement on Duplicate Bill in Equity — 273 —. Filed January 20, 1916. James W. Fletcher, Pro Prothy.

Endorsement on Second Duplicate Bill in Equity —. Filed Jan. 25, 1916. Browning, Pro Prothy.

I accept service of the within Bill in Equity — enter my appearance for the defendants.

JOHN P. CONNELLY,
City Solicitor.
Per ERNEST LOWENGRUND,
Ass't City Solicitor.

To the Prothonotary, Court of Common Pleas.

10 In the Court of Common Pleas No. 5, for the County of Philadelphia, December Term, 1915.

No. 2883.

In Equity.

THE CONTRIBUTORS TO THE PENNSYLVANIA HOSPITAL.
vs.
THE CITY OF PHILADELPHIA, THOMAS B. SMITH, Mayor; GEORGE E. Dateman, Director of the Department of Public Works, and William H. Connell, Chief of the Bureau of Highways, of Said City.

Answer to Bill of Complaint.

To the Honorable the Judges of the said Court:

We, the City of Philadelphia, Thomas B. Smith, Mayor; George E. Datesman, Director of the Department of Public Works, and Wil-

liam H. Connell, Chief of the Bureau of Highways, of said City, the defendants above named, saving and reserving to ourselves and each of us, all and all manner of exceptions to the manifold errors in the said bill contained, for answer thereto, or to such parts thereof as we are advised it is material and necessary for us to answer, say:

11 1. We admit the averment of the first paragraph of the Bill of Complaint.

2. We admit the averment of the second paragraph of the bill.

3. We admit the averment of the first sentence of the third paragraph; we are not informed as to the number of patients cared for in plaintiffs' institution, or whether they or any of them are charity patients.

4. We admit the averments of the fourth paragraph of the Bill of Complaint.

5. We have no knowledge or information with respect to the averment of the fifth paragraph of the bill, but on information of counsel, deny the relevancy thereof.

6. We admit the passage of the Act of April 17, 1854, as averred in the sixth paragraph of the Bill of Complaint.

7. We have no knowledge or information with respect to the matters set forth in the seventh paragraph of the bill. If deemed relevant or material, we pray that plaintiffs may be required to make due proof thereof.

8. We admit the dedication by plaintiffs of the strips of ground mentioned in the eighth paragraph of the bill, and the acceptance thereof by the City of Philadelphia; said strips of ground have since been, and are now laid out, opened and maintained as public streets or highways, or parts of such streets or highways, in the said City.

12 9. We admit the averment of the ninth paragraph of the bill.

10. We admit the averment of the tenth paragraph of the bill.

11. We ad the averment of the eleventh paragraph of the Bill of Complaint, and we further aver that upon the granting of the rule therein referred to, the plaintiffs in this bill filed in the Court of Quarter Sessions their answer thereto, denying the right of the City of Philadelphia to file its bond or proceed with the opening of Forty-fourth street, from Market street to Haverford avenue, as prayed for by it; such denial was based upon the same grounds and contentions as are now set up by the plaintiffs in the present bill. In the Court of Quarter Sessions the rule for leave to file the City's bond and the answer of the present plaintiffs thereto came on to be heard on June 28, 1915, whereupon, after argument and due consideration by said Court, and after amendment of the petition so that it should ask "that a jury shall be appointed for the purpose of determining what damages accrued to the hospital by reason of the taking of the contract, which it does take possession of under the right of eminent domain, and what damages independently of the contract will accrue by reason of the opening of Forty-fourth street, the jury to report these damages separately," leave was granted by order of said Court

to file the bond, which order remains in full force and effect, and afterwards, to wit, on the third day of September, 1915, in accordance therewith a bond was filed by the City of Philadelphia to
13 secure the payment of any awards which might be made in said proceeding and to pay such damages for the taking of said ground and the condemnation of any rights which the plaintiffs or others might have in the premises. A copy of said bond is hereto annexed and marked Exhibit "1."

12. We admit the existence of the Acts of May 23, 1874, P. L. 235, and June 8, 1881, P. L. 68, referred to in the twelfth paragraph of the bill. Whether said ordinance and proceedings were taken under those Acts, as averred therein, is a question of law which we are advised by counsel it is not necessary for us to answer.

13. We deny the averment of the thirteenth paragraph of the bill.

14. We deny the averment of the fourteenth paragraph of the bill.

15. We deny the averment of the fifteenth paragraph of the bill.

16. We deny the necessity for an offer to return "the consideration paid by the Contributors to the Pennsylvania Hospital upon the execution of said contract" or the moneys expended by them in consequence of the privileges secured under its terms; or that any other or further notice is required by the City of Philadelphia than the ordinance, the filing of the bond, the notices recited in the tenth and eleventh paragraphs of the Bill of Complaint, and the proceedings for condemnation and ascertainment of plaintiffs' damages in the Court of Quarter Sessions. The consideration given by the
14 Contributors to the Pennsylvania Hospital was the dedication of two certain strips of ground which, as already stated, have been and are opened and maintained as parts of public streets or highways, and which it would now be impossible to return or offer to return to plaintiffs, and if any money was expended by plaintiffs in consequence of the privileges secured to them, such claims as may arise therefrom, if any, as well as from such dedication, may be adjusted and paid in said condemnation proceedings.

17. We deny that the plaintiffs will suffer irreparable damage by the opening of Forty-fourth street through their lot, and we aver that the purpose and effect of the filing of the bond of the City as aforesaid and the prosecution of the said proceedings is to assure, ascertain and pay any and all damages arising from the opening of that street or in any manner connected therewith, and from the taking of any contractual or other rights which plaintiffs may have; and that thereunder all matters and questions incidental thereto may and should be passed upon and decided.

18. On information and advice of counsel we aver that plaintiffs are without right or title to the relief sought by them or to any relief whatever:

(*a*) Because the taking and opening of Forty-fourth street by condemnation under the power of eminent domain, as proposed, does not and will not impair the obligation of any contract with plaintiffs, is not in violation of the Constitution of Pennsylvania or of the United States, and is a valid and lawful exercise of that power.

15 (*b*) Because the Act of April 17, 1854, referred to in the bill, if given the effect of forbidding or preventing such con-

demnation, would be beyond the power of the Legislature, contrary to public policy, unconstitutional and void.

(*c*) Because the Court of Quarter Sessions of the County of Philadelphia is the proper forum in which to litigate the matters suggested by this bill; and this Honorable Court will and should refrain from interference with the proceedings therein.

(*d*) Because such proceedings furnish plaintiffs a full, complete and adequate remedy at law.

(*e*) Because all of the questions, matters and things raised or relied on by plaintiffs in the bill have already been determined and decided in that Court and have become res adjudicata.

Wherefore, we pray that the said Bill of Complaint may be dismissed and that we may be hence discharged with our reasonable costs in this behalf sustained.

CITY OF PHILADELPHIA,
THOMAS B. SMITH, *Mayor.*
THOMAS B. SMITH, *Mayor.*
GEO. E. DATESMAN,
Director of the Department of Public Works.
W. H. CONNELL,
W. P. T.,
Chief of the Bureau of Highways.

ERNEST LOWENGRUND,
Assistant City Solicitor;
JOHN P. CONNELLY,
City Solicitor,
Attorneys for Defendants.

16 CITY AND COUNTY OF PHILADELPHIA, *ss:*

Thomas B. Smith, being duly sworn according to law, deposes and says that he is Mayor of the City of Philadelphia and one of the above named defendants and that the facts set forth in the foregoing answer to the Bill of Complaint are true to the best of his knowledge, information and belief.

THOMAS B. SMITH. [SEAL.]

Sworn to and subscribed before me this First day of February, A. D. 1916.

SAMUEL J. FISHER,
Notary Public, 2311 *Wharton Street.*

Commission Expires January 21st, 1919.

17 EXHIBIT 1.

In the Court of Quarter Sessions, Philadelphia County, No. —, — Term, 1915.

Court No. —.

In the MATTER OF THE IMMEDIATE OPENING OF FORTY-FOURTH Street, from Market Street to Haverford Avenue, in the Twenty-fourth Ward.

Bond of the City of Philadelphia.

Whereas, By an ordinance of the Select and Common Councils of the City of Philadelphia, approved on the 18th day of December, A. D. 1913, the opening of Forty-fourth street, from Market street to Haverford avenue, in the Twenty-fourth Ward, to public use, was duly authorized;

And Whereas, By the said ordinance the Mayor of the said City was authorized to enter security on behalf of the City for the payment of any damages which may accrue to the owners of property over and through which the said street will pass in such sum as the Court might direct, in order that the said street might be

18 immediately thrown open for public use:

And Whereas, On the 28th day of June, A. D. 1915, the Court of Quarter Sessions did order, adjudge and decree that the City file its bond to secure the payment of awards to the owners of property over and through which said street will pass, and upon the filing of said bond, the City to have leave to enter upon and open said street to public use, without delay or hindrance, it having been agreed between the City of Philadelphia and the Contributors to the Pennsylvania Hospital, as per stenographic notes of the Court Stenographer hereto annexed and made part hereof, marked "Exhibit A," that the petition of the City of Philadelphia for leave to file its bond should be considered as amended so that it will aver that it is informed that the Hospital claims by virtue of a contract alleged to have been entered into by means of an Act of Assembly, approved April 17, 1854, whereby the City of Philadelphia is debarred from entering upon its property by opening streets; that the City of Philadelphia denies that by virtue of any such Act of Assembly there is any contract right on the part of the Hospital to deny the opening of streets through, it averring that the contract is illegal. In order, however, to set at rest all doubt, the City of Philadelphia asks that a jury shall be appointed for the purpose of determining what damages accrue to the Hospital by reason of the taking possession of the contract, which it does take possession of under the right of eminent domain, and what damages, independently of the contract, will accrue by reason of the opening of Forty-fourth street, the jury to report these damages separately, the City not to be taken as

19 having agreed that the Hospital is entitled to any damages by reason of the taking of the contract, but that matter, with the damages ascertained, to be referred to the Court for determination.

Now, know all men by these presents, that the said the City of Philadelphia is held and firmly bound unto Contributors of the Pennsylvania Hospital, or whoever else by proceedings duly had may be adjudged lawful owners or tenants of the ground through and over which the said Forty-fourth street, from Market street to Haverford avenue, in the Twenty-fourth Ward, will pass, for the payment of any awards which may be made in said proceeding, to be paid to the said obligees or to such persons as in proceedings duly had may be adjudged entitled to damages for or by reason of the said opening, their certain attorneys, executors, administrators or assigns, to which payment, well and truly to be made, the said the City of Philadelphia hereby binds itself, its successors and assigns, firmly by these presents.

Now the condition of this obligation is such, that if the said the City of Philadelphia shall and do, well and truly pay or cause to be paid any damages which in any proceedings in the Court of Quarter Sessions duly authorized by law, may be awarded and confirmed as payable by said City to the person or persons judicially ascertained to be entitled to receive the same, in accordance with the statutes in such case made and provided in the matter of the taking, injury or destruction of private property for the opening of the said Forty-fourth street, from Market street to Haverford avenue, in the Twenty-
20 fourth Ward, then this obligation to be void and of no effect; otherwise to be and remain in full force and virtue.

In Witness Whereof, the Mayor of the said City of Philadelphia has hereunto set his hand and affixed the corporate seal of the said City this 3d day of September, in the year of our Lord one thousand nine hundred and fifteen (1915).

(Signed) RUDOLPH BLANKENBURG,
Mayor of the City of Philadelphia.

Sealed and delivered in the presence of:
(Signed) C. H. DALRYMPLE. [SEAL.]

21 EXHIBIT A (Attached to Bond).

Court of Quarter Sessions (Room C).

In re OPENING OF FORTY-FOURTH STREET, FROM MARKET STREET to Haverford Avenue, Twenty-fourth Ward, of the City of Philadelphia.

Before Honorable Mayer Sulzberger, P. J.

PHILADELPHIA, June 28, 1915.

Present of counsel:

Michael J. Ryan, Esq., City Solicitor, for the Petition.
Charles Biddle, Esq., and John G. Johnson, Esq., for the Contributors to the Pennsylvania Hospital.

(It is agreed that the City of Philadelphia will amend its petition so that it will aver that it is informed that the Hospital claims by

virtue of a contract alleged to have been entered into by means of an Act of Assembly, approved April 17, 1854, whereby the City of Philadelphia is debarred from entering upon its property by opening streets; that the City of Philadelphia denies that by virtue of any such Act of Assembly there is any contract right on the part of the Hospital to deny the opening of streets through, it averring that the contract is illegal. In order, however, to set at rest all doubt, the City of Philadelphia asks that a jury shall be appointed for
22 the purpose of determining what damages accrue to the Hospital by reason of the taking possession of the contract, which it does take possession of under the right of eminent domain, and what damages, independently of the contract, will accrue by reason of the opening of Forty-fourth street, the jury to report these damages separately, the City not to be taken as having agreed that the Hospital is entitled to any damages by reason of the taking of the contract, but that matter, with the damages ascertained, to be referred to the Court for determination.)

The Court: Does the Hospital waive any further notice and agree that all notices heretofore given apply to the petition as it is proposed to be amended?

Mr. Johnson: Yes. That is right.

Mr. Ryan: Yes.

The Court: The amendment is granted.

Mr. Johnson: It is understood the petition shall be taken as so amended?

Mr. Ryan: Yes.

The Court: An order is made accordingly.

Endorsement: No. 2883. December Term, 1915.—In the Court of Common Pleas No. 5,—for the County of Philadelphia—In Equity—The Contributors to the Pennsylvania Hospital, Plaintiffs, vs. The City of Philadelphia, Thomas B. Smith, Mayor, George E. Datesman, Director of the Department of Public Works, and William H. Connell, Chief of the Bureau of Highways of said City, Defendants—Answer to Bill of Complaint—Ernest Lowengrund, Assistant City Solicitor—John P. Connelly, City Solicitor, Attorneys for Defendants—Dunlap Printing Co., 1315-29 Cherry Street—Filed Feb. 2, 1916. Geasey, Pro. Proth'y.

23 In the Court of Common Pleas, No. 5, for the County of Philadelphia, December Term, 1915.

In Equity.

No. 2883.

THE CONTRIBUTORS TO THE PENNSYLVANIA HOSPITAL
vs.
CITY OF PHILADELPHIA et al.

As this case comes on for hearing upon a Bill and Answer, matters not denied by the Answer are to be taken as true and matters set up

in the Answer are also to be taken as true. The Court, therefore, makes the following

Findings of Fact.

1. Plaintiff is a corporation of Pennsylvania.

2. Plaintiff owns a large tract of ground in West Philadelphia, more particularly described in the second paragraph of the Bill.

3. On this tract of ground plaintiff maintains a hospital for the insane, has erected many valuable buildings and improvements for that purpose and has three hundred and seventy-one insane
24 patients thereon, many of whom are charity patients.

4. Plaintiff has owned said lot since 1836.

5. On February 2nd, 1854, a committee, appointed by the Managers of the Pennsylvania Hospital, memorialized the General Assembly of the Commonwealth of Pennsylvania against the opening of any streets, lanes or alleys through the said piece of ground on which the said insane department was then situated.

6. As a result of said memorial the Act of April 17th, 1854, (P. L. 385) was passed by the General Assembly.

7. The provisions of said Act were formally accepted by a resolution of the plaintiff on May 2nd, 1854, which resolution recited the terms of the act and resolved that the corporation accept its terms and dedicate, without charge to the city, the land necessary for the streets mentioned in the act and in accordance with the act's provisions.

8. Pursuant to the resolution above mentioned plaintiff, by deeds of dedication, dedicated the two pieces of ground for use as streets to the city. The city accepted the dedication and the said strips of ground are now used as public streets or highways.

9. By ordinance of December 18th, 1913, the Select and Common Councils of the City of Philadelphia decided to take, at the expiration of three months, the bed of Forty-fourth Street, as laid out from Market Street to Haverford Avenue, which street, when opened, will pass through the centre of plaintiff's said lot of ground.

10. On January 27th, 1914, the Chief of the Bureau of Highways, who is the proper executive officer charged with that duty,
25 notified plaintiff that said Forty-fourth street would be opened through its land.

11. The parties, not having been able to agree upon compensation for the opening the City took a rule to file its bond to secure plaintiff for the damages by reason of the opening. Upon the hearing of the said rule the same was amended by agreement of the parties and allowance of the Court to include compensation for the taking of the contract under the Act of April 17th, 1854 (if it be a contract) as well as compensation for the opening, to be considered separately, and was then made absolute. The Court of Quarter Sessions fixed the amount of the bond and the same was filed.

Based upon the foregoing Findings of Fact, the Court makes the following

Conclusions of Law.

1. Nothing in the said Act of April 17th, 1854, deprives the City of Philadelphia, acting under authority of the Commonwealth of Pennsylvania, by virtue of the Act of June 8th, 1881 (P. L. 68), which is declaratory of the Act of May 23rd, 1874, (P. L. 235), from exercising its right of eminent domain in the matter of opening streets through plaintiff's tract.

2. The action of the City of Philadelphia in opening said street through plaintiff's tract does not constitute a violation of Article I, Section 18, of the Constitution of the Commonwealth of Pennsylvania.

3. The action of the said City of Philadelphia in opening said street through plaintiff's tract does not constitute a violation of Article I, Section 10, of the Constitution of the United States.

4. The Ordinance of December 18th, 1913, recited in paragraph Ninth of plaintiff's Bill and the proceedings thereunder are valid and legal and do not constitute a violation of Article I, Section 10, of the Constitution of the United States.

26 5. Plaintiff has an adequate remedy at law.

6. The Bill should be dismissed at the cost of the plaintiff.

Opinion.

Our reasons for holding that the Bill must be dismissed need not be stated at any length. The facts are not in dispute.

So far as this Court is concerned we are bound by In re Opening of 22nd Street, 102 Pa. 108, (1883), where a similar Act of Assembly was passed for the protection of a cemetery company and where a contention similar to that in the present case was made and was overruled in an opinion by Judge Paxson. In that case he said:

"It is incident to the sovereignty of every government that it may take private property for public use. Of the necessity and expediency of this taking the government must judge, and the only limitations to which this power is subject are that the taking must be for public use, and with the concomitant obligation to make just compensation for the property taken. * * *

"Property and contracts of all kinds must yield to this demand of the sovereign, for all persons hold their property subject to requisitions for the public service. Franchises are held in subordination to this supreme power and must give way before its proper exercise. Implied conditions arising out of the paramount authority

27 and necessities of the state enter into all such contracts. It is now well settled that there is no distinction between corporeal and incorporeal property in this respect, and a franchise may be taken or destroyed in the exercise of this right as well as any other property.

"A contract is property, but is no more sacred than other property. Its obligation is not impaired, but it is recognized when compensa-

tion is provided for its infringement. These principles are well established, and are supported by clouds of cases in the several states." See also

Commonwealth vs. Broad St. Rapid Transit Railway Company, 219 Pa. 11,

where Mr. Justice Mitchell said:

"But — is conceded that one legislature cannot grant away the state's right of eminent domain so as to bind future legislatures: In re opening of Twenty-Second Street. * * *"

If the contract in this case were binding upon the Commonwealth of Pennsylvania then, of course, this Bill would lie, because the damage resulting from the City's proceeding with the physical work of opening the street through plaintiff's land will be irreparable. The condemnation proceeding, whose purpose is to assess the plaintiff's damage for the opening of the street and the taking their contract with the state, would be wholly inadequate if it were the plaintiff's right specifically to enforce the alleged contract with the state arising out of the Act of 1854. In our view, however, this matter is concluded by the decisions above quoted and the right of the State is clear to condemn not only the land but the contract. This
28 being so, and it being conceded that a proper proceeding has been instituted and a proper bond therein filed to indemnify the plaintiff for the taking, we are of opinion that the plaintiff's remedy at law is adequate and that the Bill must be dismissed. A decree nisi will be entered which, unless exceptions are filed, will become absolute in ten days. The Clerk will notify counsel of the entry of the decree nisi.

J. WILLIS MARTIN.

3/17/16.

29 *Decree.*

And now, March 17th, 1916, this cause having come on for hearing upon Bill and Answer, it is ordered, adjudged and decreed that the bill be dismissed at the cost of the plaintiff.

MARTIN, *J.*

Endorsement: In the Court of Common Pleas No. 5 for the County of Philada.—No. 2883 December T. 1915—In Equity—The Contributors to the Pennsylvania Hospital vs. City of Philadelphia, et al.—Findings of Fact—Conclusions of Law—Opinion—Decree—Filed Mar. 17, 1916. Geasey, Pro. Prothy.

30 In the Court of Common Pleas No. 5 for the County of Philadelphia, December Term, 1915.

No. 2883.

THE CONTRIBUTORS TO THE PENNSYLVANIA HOSPITAL
vs.
CITY OF PHILADELPHIA et al.

And now come the Contributors to the Pennsylvania Hospital, the complainants in the above cause, by their counsel, Biddle, Paul & Jayne and Roberts, Montgomery & McKeehan, and take the following exceptions to the findings and conclusions of the learned Chancellor therein:—

1. Complainant excepts to the first conclusion of law, which is as follows:

"1. Nothing in the said Act of April 17th, 1854, deprives the City of Philadelphia, acting under authority of the Commonwealth of Pennsylvania, by virtue of the Act of June 8th, 1881 (P. L. 68), which is declaratory of the Act of May 23rd, 1874 (P. L. 235), from exercising its right of eminent domain in the matter of opening streets through plaintiff's tract."

2. Complainant excepts to the learned Chancellor's second conclusion of law, which is as follows:

"2. The action of the City of Philadelphia in opening said
31 street through plaintiff's tract does not constitute a violation of Article I, Section 18, of the Constitution of the Commonwealth of Pennsylvania."

3. Complainant excepts to the learned Chancellor's third conclusion of law, which is as follows:

"3. The action of the said City of Philadelphia in opening said street through plaintiff's tract does not constitute a violation of Article 1, Section 10, of the Constitution of the United States."

4. The complainant excepts to the learned Chancellor's fourth conclusion of law, which is as follows:

"4. The ordinance of December 18th, 1913, recited in paragraph Ninth of plaintiff's Bill and the proceedings thereunder are valid and legal and do not constitute a violation of Article 1, Section 10, of the Constitution of the United States."

5. Complainant excepts to the learned Chancellor's fifth conclusion of law, which is as follows:

"5. Plaintiff has an adequate remedy at law."

6. Complainant excepts to the learned Chancellor's sixth conclusion of law, which is as follows:

"6. The Bill should be dismissed at the cost of the plaintiff."

Respectfully submitted,

BIDDLE, PAUL & JAYNE,
ROBERTS, MONTGOMERY & McKEEHAN,
For Complainant.

March 22nd, 1916.

Endorsement: No. 2883 Dec. Term 1915—C. P. No. 5—The Contributors to the Pennsylvania Hospital, vs. City of Philadelphia, et al.—Plaintiff's Exceptions to Findings of Fact and Conclusions of Law.—Filed Mar. 20, 1916. Geasey, Pro. Prothy—Biddle, Paul & Jayne, Roberts, Montgomery & McKeehan for plaintiff.

32 In the Court of Common Pleas No. 5 for the County of Philadelphia, December Term, 1915.

No. 2883.

THE CONTRIBUTORS TO THE PENNSYLVANIA HOSPITAL
vs.
CITY OF PHILADELPHIA et al.

And now, March 24th, 1916, the exceptions filed by the complainant in the above cause are dismissed, and it is ordered, adjudged and decreed that the bill be dismissed at the costs of the plaintiff.

MARTIN, *J.*

Endorsement: 2883 Dec. T. 1915—C. P. No. 5—The Contributors to the Pennsylvania Hospital vs. City of Philadelphia, et al.—Final Decree—Filed Mar. 24, 1916. Geasey, Pro. Prothy—Lowengrund Connolly Pro defts.

33 January Term, 1916.

Appeal of Plaintiff.

No. 2883. December Term, 1915. From the Decree.

155.

THE CONTRIBUTORS TO THE PENNSYLVANIA HOSPITAL, Plaintiff,
v.
THE CITY OF PHILADELPHIA, THOMAS B. SMITH, the Mayor; GEORGE E. DATESMAN, the Director of the Department of Public Works; and William H. Connell, the Chief of the Bureau of Highways of said City, Defendants.

Roberts, Montgomery & McKeehan.
Owen J. Roberts.
J. Rodman Paul.
Biddle, Paul & Jayne.
Appeal from Court of Common Pleas No. 5, of County of Philadelphia.
Filed April 11, 1916.
Eo die—Certiorari exit.
Ret'ble—First Monday, January, 1917.

April 15, 1916—Record returned & filed.

April 27, 1916—Assignments of Error filed.

April 15, 1916—Petition to advance case filed John P. Connelly, City Solicitor.

April 15, 1916—Granted. Place at foot of list on Monday, May 15, '16. Per Curiam.

May 16, 1916—Argued.

July 1, 1916—Decree affirmed at appellant's costs. Per Curiam.

July 11, 1916—Remittitur exit and with record sent to Prothonotary of Philadelphia County.

December 14, 1916—Petition for Writ of Error brought into office.

December 14, 1916—Writ of Error to the Supreme Court of the United States brought into office. Allowed by Hon. Mahlon Pitney, Associate Justice of the Supreme Court of the United States, November 29, 1916.

34 December 14, 1916—Bond for Five Hundred ($500.00) Dollars brought into office. Approved by Hon. Mahlon Pitney, Associate Justice of the Supreme Court of the United States.

December 14, 1916—Citation brought into office, with acceptance of service endorsed thereon.

December 14, 1916—Assignments of Error to the Supreme Court of the United States brought into office.

December 14, 1916—Prayer for Reversal brought into office.

December 16, 1916—Stipulation specifying the portions of record which shall constitute the transcript of record sur Writ of Error filed.

35 In the Supreme Court of Pennsylvania.

For the Eastern District, January Term, 1916.

No. 155.

THE CONTRIBUTORS TO THE PENNSYLVANIA HOSPITAL, Appellant,
vs.
CITY OF PHILADELPHIA et al., Appellees.

Assignments of Error.

1. The learned Court below erred in dismissing plaintiff's first exception, which was as follows:

"1. Complainant excepts to the first conclusion of law, which is as follows:

" '1. Nothing in the said Act of April 17th, 1854, deprives the City of Philadelphia, acting under authority of the Commonwealth of Pennsylvania, by virtue of the Act of June 8th, 1881 (P. L. 68), which is declaratory of the Act of May 23rd, 1874 (P. L. 235), from exercising its right of eminent domain in the matter of opening streets through plaintiff's tract.' (p. 13).

"Answer: And Now, March 24th, 1916, the exceptions filed by

the complainant in the above cause are dismissed, and it is Ordered, Adjudged and Decreed that the bill be dismissed at the costs of the plaintiff." (p. 15).

2. The learned Court below erred in dismissing plaintiff's second exception, which was as follows:

"2. Complainant excepts to the learned Chancellor's second conclusion of law, which is as follows:

36 "'2. The action of the City of Philadelphia in opening said street through plaintiff's tract does not constitute a violation of Article I, Section 18, of the Constitution of the Commonwealth of Pennsylvania.' (p. 13.)

Answer: "And Now, March 24th, 1916, the exceptions filed by the complainant in the above cause are dismissed, and it is Ordered, Adjudged and Decreed that the bill be dismissed at the costs of the plaintiff." (p. 15.)

3. The learned Court below erred in dismissing plaintiff's third exception, which was as follows:

"3. Complainant excepts to the learned Chancellor's third conclusion of law, which is as follows:

"'3. The action of the said City of Philadelphia in opening said street through plaintiff's tract does not constitute a violation of Article I, Section 10, of the Constitution of the United States.' (p. 14.)

Answer: "And now, March 24th, 1916, the exceptions filed by the complainant in the above cause are dismissed, and it is Ordered, Adjudged and Decreed that the bill be dismissed at the costs of the plaintiff (p. 15).

4. The learned Court below erred in dismissing plaintiff's fourth exception, which was as follows:

"4. The complainant excepts to the learned Chancellor's fourth conclusion of law, which is as follows:

"'4. The ordinance of December 18th, 1913, recited in Paragraph Ninth of Plaintiff's Bill and the proceedings thereunder are valid and legal and do not constitute a violation of Article 1, Section 10, of the Constitution of the United States." (p. 14.)

37 Answer: "And now, March 24th, 1916, the exceptions filed by the complainant in the above cause are dismissed, and it is Ordered, Adjudged and Decreed that the bill be dismissed at the costs of the plaintiff." (p. 15.)

5. The learned Court below erred in dismissing plaintiff's fifth exception, which was as follows:

"5. Complainant excepts to the learned Chancellor's fifth conclusion of law, which is as follows:

"'5. Plaintiff has an adequate remedy at law.' (p. 14).

Answer: "And now, March 24th, 1916, the exceptions filed by the complainant in the above cause are dismissed, and it is Ordered, Adjudged and Decreed that the bill be dismissed at the costs of the plaintiff." (p. 15).

6. The learned Court below erred in dismissing plaintiff's sixth exception, which was as follows:

"6. Complainant excepts to the learned Chancellor's sixth conclusion of law, which is as follows:

"'6. The Bill should be dismissed at the cost of the plaintiff.' (p. 14.)

Answer: "And now, March 24th, 1916, the exceptions filed by the complainant in the above cause are dismissed, and it is Ordered, Adjudged and Decreed that the bill be dismissed at the costs of the plaintiff." (p. 15.)

7. The learned Court below erred in entering the final decree, which decree was as follows:

"And Now, March 24th, 1916, the exceptions filed by the complainant in the above cause are dismissed, and it is ordered, adjudged and decreed that the bill be dismissed at the costs of the plaintiff." (p. 15.)

ROBERTS, MONTGOMERY, & McKEEHAN,
BIDDLE, PAUL, & JAYNE,
For Appellant.

38 Endorsements: No. 155. January Term, 1916. In the Supreme Court of Pennsylvania, for the Eastern District. The Contributors to the Pennsylvania Hospital, Appellant, vs. City of Philadelphia, et al., Appellees. Assignments of Error. Filed Apr- 27 1916 in Supreme Court. Roberts, Montgomery & McKeehan, Biddle, Paul & Jayne, for Appellant.

39 In the Supreme Court of Pennsylvania.

Eastern District, January Term, 1916.

No. 155.

Appeal from C. P. No. 5, Philadelphia.

THE CONTRIBUTORS TO THE PENNSYLVANIA HOSPITAL, Appellant,
v.
CITY OF PHILADELPHIA, THOMAS B. SMITH, Mayor; GEORGE E. Datesman, Director of the Department of Public Works; and William H. Connell, Chief of the Bureau of Highways of the said City.

Filed July 1, 1916.

Per Curiam:

Conceding that the act of April 17, 1854, P. L. 385, became a contract on the part of the State with the Contributors to the Pennsylvania Hospital, it must yield to the demand of the sovereign "for all persons hold their property subject to the requisitions for the public service": In re Twenty-seventh Street, 102 Pa., 108; and "one legislature cannot grant away the state's right of eminent

domain so as to bind future legislatures": Commonwealth v. Rap. Tr. St. Ry. Co., 219 Pa., 11. In dismissing appellant's bill, the learned chancellor below but followed the recognition given in all jurisdictions to the sovereign right of the State to take every species of property when needed for public use. In so taking a contract the State does not impair its obligation, for it makes compensation therefor to the party from whom its enjoyment is taken. "The constitutional inhibition upon any State law impairing the obligation of contracts is not a limitation upon the power of eminent domain. The obligation of a contract is not impaired when it is appropriated to a public use and compensation made therefor. Such an exertion of power neither challenges its validity nor impairs its obligation. Both are recognized, for it is appropriated as an existing enforceable contract. It is a taking, not an impairment of its obligation. If compensation be made, no constitutional right is violated. All of this has been so long settled as to need only the citation of some of the many cases. Charles River Bridge vs. Warren Bridge, 11 Pet. 420; The West River Bridge Co. vs. Dix, 6 How. 507, N. O. Gas Co. vs. La. Light Co., 115 U. S. 650; Long Island Water Supply Co. vs. Brooklyn, 166 U. S. 685; Offield vs. Railroad Co., 203 U. S. 372.

"Every contract, whether between the State and an individual or between individuals only, is subject to this general law. There enters into every engagement the unwritten condition that it is subordinate to the right of appropriation to a public use. The West River Bridge Co. vs. Dix, 6 How. 507; Long Island Water Supply Co. vs. Brooklyn, 166 U. S. 691-2": The City of Cincinnati v. Louisville and Nashville Railroad Company, 223 U. S., 390.

Decree affirmed at appellant's costs.

Endorsement: 155. January Term, 1916. The Contributors to the Pennsylvania Hospital, Appellant, v. City of Philadelphia, Thomas B. Smith, Mayor, et al. Appeal from C. P. No. 5, Phila. Decree affirmed per Curiam. Filed Jul- 1 1916 in Supreme Court J. H. B.

41 In the Supreme Court of the United States, — Term, 1916.

No. —.

THE CONTRIBUTORS TO THE PENNSYLVANIA HOSPITAL, Plaintiff in Error,

vs.

CITY OF PHILADELPHIA, THOMAS B. SMITH, Mayor; GEORGE E. Datesman, Director of the Department of Public Works, and William H. Connell, Chief of the Bureau of Highways of the said City, Defendants in Error.

Petition for Writ of Error to the Supreme Court of the State of Pennsylvania.

Filed Dec. 14, 1916, in Supreme Court.

Biddle, Paul & Jayne, Roberts, Montgomery & McKeehan, Attorneys for Plaintiff in Error.
Owen J. Roberts, 1421 Chestnut St., Philada., Pa.

42 Supreme Court of the United States, — Term, 1916.

No. —.

THE CONTRIBUTORS TO THE PENNSYLVANIA HOSPITAL, Plaintiff in Error,

vs.

CITY OF PHILADELPHIA, THOMAS B. SMITH, Mayor; GEORGE E. Datesman, Director of the Department of Public Works, and William H. Connell, Chief of the Bureau of Highways of the said City, Defendants in Error.

Petition for Writ of Error to the Supreme Court of the State of Pennsylvania.

To the Honorable Edward D. White, Chief Justice of the Supreme Court of the United States, and to the Honorable Mahlon Pitney, Associate Justice of the Supreme Court of the United States, and to the Other Justices of the said Honorable Court, and to the Honorable, the Supreme Court of the United States:

The petition of the Contributors to the Pennsylvania Hospital, a corporation of the State of Pennsylvania, having its principal
43 office in, and being a resident of the City and County of Philadelphia, in said State, respectfully represents:

1. On January 18th, 1916, petitioner filed a Bill in Equity, as plaintiff, against the City of Philadelphia, Thomas B. Smith, Mayor, George E. Datesman, Director of the Department of Public Works, and William H. Connell, Chief of the Bureau of Highways, of the said City, as defendants, in the Court of Common Pleas No. 5, of

Philadelphia County, as of December Term, 1915, No. 2883, in equity, to restrain and enjoin the defendants from opening, under the alleged authority conferred by certain statutes of Pennsylvania, a street through the property of the plaintiff, situate in the City of Philadelphia, upon the ground that the opening of such street would impair, contrary to the provisions of the Constitution of the State of Pennsylvania and the Constitution of the United States, the obligation of a contract entered into between the plaintiff and the State of Pennsylvania evidenced by an Act of the General Assembly of Pennsylvania approved April 17th, 1854.

2. The Bill in Equity alleged that the plaintiff was a corporation of the State of Pennsylvania engaged in maintaining and operating a hospital, known as the Pennsylvania Hospital; that it was the owner of a lot in Philadelphia lying between Haverford Avenue and Market Street, where it maintained a Department for the care of insane patients, many of whom were charity patients; that the plaintiff bought this property in 1836, and erected thereon for the purpose of maintaining said insane department many and valuable buildings and improvements.

The Bill further alleged that in 1854, a committee appointed by the managers of the plaintiff, memorialized the General Assembly of Pennsylvania against the opening of any streets through said property upon which said Insane Department was then situate; that as a result, the Act of the General Assembly of Pennsylvania, approved April 17th, 1854 (Pamphlet Laws 385), was passed, enacting that

44 no streets should thereafter be opened through said property without the consent of the plaintiff so long as said property should be used for the purposes of an insane department, provided the plaintiff contributed ground for one-half of an avenue on the east line, and one-half of an avenue on the west line of said property, said avenue to be one hundred feet in width, a copy of said Act being as follows:

"An act to prevent streets being laid out through the grounds of the Pennsylvania Hospital, without the consent of the Managers.

"Section 1. Be it enacted by the Senate and House of Representatives of the Commonwealth of Pennsylvania in General Assembly met, and it is hereby enacted by the authority of the same, That no streets, alleys, roads or lanes, shall ever be opened through the property belonging to the corporation of the contributors to the Pennsylvania Hospital, situate in the twenty-fourth ward of the City of Philadelphia, without the consent of the said corporation, so long as the said property is used for the purposes of their insane department, any law to the contrary notwithstanding: Provided, That said corporation shall contribute one-half the ground, for an avenue, on their east, one on their west line, each one hundred feet in width, without charge to the City and County of Philadelphia."

The Bill further alleged that the provisions of said Act were accepted by a resolution of the managers of the plaintiff, that, in accordance with the terms of said Act, and as a consideration for the

provisions thereof exempting said property from the opening of any streets through it without the consent of the plaintiff, proper deeds of dedication were made to the City of Philadelphia for the two strips of ground on the eastern and western boundaries of the property for street purposes; and that the land so conveyed was duly accepted by said City, and was, at the date of the Bill, held and occupied by it.

45 The Bill further alleged that, in 1913, an Ordinance was passed by the City of Philadelphia opening Forty-fourth Street from Market Street to Haverford Avenue, directing the Department of Public Works to notify the owners of property over and through which Forty-fourth Street from Market Street to Haverford Avenue would pass, that at the expiration of three months from such notice, said street would be required for public use, directing the Mayor to enter security for the payment of any damages which might be assessed by reason of the opening of said street, and further directing the Department of Public Works, upon the entry of said security, and at the expiration of said three months, to proceed forthwith to open said street; that on January 27th, 1914, said notice was given to the plaintiff; and that proceedings were instituted in the Court of Quarter Sessions of Philadelphia County for the entry of such security.

The Bill further alleged that said Ordinance was passed, and said proceedings were being taken under the Act of Pennsylvania of June 8th, 1881, Pamphlet Laws 68, declaratory of the Act of May 23d, 1874, P. L. 235, which gave the municipal authorities of the City of Philadelphia the right to open streets "any private or special statute to the contrary notwithstanding;" that said Acts did not empower the City of Philadelphia to take the right and privilege granted to the plaintiff by said Act of 1854; that said Ordinance and the proceedings thereunder were void and illegal under the Constitution of Pennsylvania and the Constitution of the United States forbidding laws which impair the obligation of contracts; that no offer has been made by the City to return the consideration paid by the plaintiff for the privilege granted, and that the damage to the plaintiff caused by the opening of the street in question would be irreparable. The Bill prayed for an injunction re-training the opening of said street.

3. The defendants filed an Answer to the Bill on February

46 2d, 1916. None of the facts averred in the Bill of Complaint was denied except the averment of irreparable damage. The legal conclusions averred in the Bill were denied. In addition to the facts set forth in the Bill, the Answer averred that in said proceedings instituted in the Court of Quarter Sessions of Philadelphia County for the entry of security by the City of Philadelphia, the plaintiff filed an Answer to the petition of the City of Philadelphia for leave to enter its own bond, in which Answer it denied the right of the City to file its own bond or to proceed with the opening of said street upon the same grounds and conditions as were set up by the plaintiff in the Bill of Complaint; that said Court of Quarter Sessions, after argument and due consideration, ordered that a jury of view should be appointed for determining what damages accrued

to the plaintiff by reason of the taking of said contract, and what damages independently of the taking of said contract would accrue by reason of the opening of said street, the jury to report as to these damages separately, and that the City should enter its own bond. The Answer averred that said order remained in full force and effect, and that thereafter the bond of the City was filed in accordance therewith; denied any necessity for an offer to return the consideration paid by the plaintiff, or the moneys expended by them in consequence of the privileges secured under its terms; denied that said Acts of 1874 and 1881 did not empower the City to take the plaintiff's privileges; denied that said Acts were unconstitutional as impairing the obligation of the plaintiff's contract; averred that said Act of 1854, if given the effect of forbidding the City of Philadelphia from opening said street, would be beyond the power of the Legislature, contrary to public policy, unconstitutional and void. The Answer further averred that said Court of Quarter Sessions was the proper forum in which to litigate the matter suggested by the Bill; that said proceedings furnished the plaintiff a full, complete and adequate remedy at law; and that all of the questions, matters and things raised or relied upon by the plaintiff in the Bill
47 had already been determined upon and decided in said Court of Quarter Sessions, and had become res adjudicata; and prayed for a dismissal of the Bill.

4. The case was heard on Bill and Answer. No proofs were submitted. The facts averred in the Bill and not denied in the Answer, and the facts averred in the Answer were taken as true. On March 17th, 1916, the Court filed its Findings of Fact and Conclusions of Law, together with its Opinion, and entered a Decree nisi, dismissing the Bill of Complaint. The Court, in its Findings of Fact, found substantially the facts alleged in the Bill. In its Conclusions of Law, the Court held that the Act of 1854 did not deprive the City of Philadelphia, acting under the authority of said Acts of 1874 and 1881, from exercising its right of eminent domain in the matter of opening streets through plaintiff's property; that the action of the City of Philadelphia in opening said street did not violate the provisions of the Constitution of Pennsylvania or of the United States, forbidding the impairment of the obligation of contract; that the Ordinance and the proceedings thereunder were legal and not in violation of the provisions of the Constitution of the United States forbidding the impairment of the obligation of contract, and that the plaintiff had an adequate remedy at law. In its Opinion, the Court said:—

"If the contract (evidenced by said Act of 1854) in this case were binding upon the Commonwealth of Pennsylvania, then, of course, this Bill would lie, because the damage resulting from the City's proceeding with the physical work of opening the street through plaintiff's land would be irreparable. The condemnation proceeding (said proceedings in the Court of Quarter Sessions) whose purpose is to assess plaintiff's damage for the opening of the street and taking of their contract with the State, would be wholly inadequate if it were the plaintiff's right specifically to enforce the

alleged contract with the State arising out of the Act of 1854."

48 The Court, however, held that the right of the State to condemn not only the land, but the contract, was clear, and that by reason thereof the Quarter Sessions proceedings were properly instituted, and the plaintiff had an adequate remedy at law.

5. The plaintiff, on March 20th, 1916, filed Exceptions to each of said Conclusions of Law of said Court of Common Pleas and these Exceptions and also the Bill were dismissed by a Final Decree entered on March 24th, 1916, by said Court.

6. Thereafter, the plaintiff, on April 11th, 1916, appealed from said Final Decree entered on March 24th, 1916, to the Supreme Court of Pennsylvania as of January Term, 1916, No. 155, and in its formal Assignments of Error filed in said Supreme Court in said Appeal, your petitioner averred that said Court of Common Pleas, No. 5, of Philadelphia County erred in dismissing said Exceptions, and in entering said Decree of March 24th, 1916.

7. Submitted herewith are copies of the printed Paper Books filed in the Supreme Court of Pennsylvania in said Appeal, in which appear true and correct copies of said Bill in Equity, the Answer thereto, the Findings of Fact, Conclusions of Law, Opinion and Decree Nisi of said Court of Common Pleas, No. 5, the Exceptions of the Plaintiff thereto, the Final Decree of March 24th, 1916, and the Assignments of Error filed in the Supreme Court of Pennsylvania, and of all other papers constituting the record of said proceeding.

8. On July 1st, 1916, the Supreme Court of the State of Pennsylvania affirmed said Decree entered on March 24th, 1915, by the Court of Common Pleas, No. 5, of Philadelphia County, in

49 an opinion (reported in 253 Pa. State Reports, pages — to —), a copy of which is as follows:—

"Per Curiam:

"Conceding that the Act of April 17th, 1854, P. L. 385, became a contract on the part of the State with the Contributors to the Pennsylvania Hospital, it must yield to the demand of the sovereign, 'for all persons hold their property subject to the requisitions for the public service:' In re Twenty-second Street, 102 Pa. 108; and 'one legislature cannot grant away the State's right of eminent domain so as to bind future legislatures;' Commonwealth vs. Rap. Tr. St. Ry. Co., 219 Pa. 11. In dismissing appellant's bill, the learned chancellor below but followed the recognition given in all jurisdictions to the sovereign right of the State to take every species of property when needed for public use. In so taking a contract the State does not impair its obligation, for it makes compensation therefor to the party from whom its enjoyment is taken. 'The constitutional inhibition upon any State law impairing the obligation of contracts is not a limitation upon the power of eminent domain. The obligation of a contract is not impaired when it is appropriated to a public use and compensation made therefor. Such an exertion of power neither challenges its validity nor impairs its obligation.

Both are recognized, for it is appropriated as an existing enforceable contract. It is a taking, not an impairment of its obligation. If compensation be made, no constitutional right is violated. All of this has been so long settled as to need only the citation of some of the many cases. Charles River Bridge Co. vs. Warren Bridge, 11 Pet. 420; the West River Bridge Co. vs. Dix, 6 How. 507; N. O. Gas Co. vs. La Light Co., 115 U. S. 650; Long Island Water Supply Co. vs. Brooklyn, 166 U. S. 685; Offield vs. Railroad Co., 203 U. S. 372.

"Every contract, whether between the State and an individual or between individuals only, is subject to this general
50 law. There enters into every engagement the unwritten condition that it is subordinate to the right of appropriation to public use. The West River Bridge Co. vs. Dix, 6 How. 507; Long Island Water Supply Co. vs. Brooklyn, 168 U. S. 691-2. The City of Cincinnati vs. Louisville & Nashville Railroad Co., 223 U. S. 390.

"Decree affirmed at appellant's costs."

9. Your petitioner avers that in the argument had before the Honorable Justices and the Supreme Court of Pennsylvania, it contended that said Ordinance of the City of Philadelphia and the proceedings thereunder impaired the obligation of said contract between petitioner and the State of Pennsylvania, evidenced by said Act of April 17th, 1854, contrary to the provisions of Article I, Section 10, of the Constitution of the United States.

10. Your petitioner avers that said judgment of the Supreme Court of Pennsylvania is the judgment in the highest Court of the State of Pennsylvania in which a decision in said suit could be had, and that there was drawn in question the validity of a statute of, and an authority exercised under, the State of Pennsylvania on the ground of their being repugnant to the Constitution of the United States, and the decision was in favor of their validity.

11. The sole question presented by this appeal is whether a contract by a State not to exercise its power of eminent domain, based upon a valuable consideration, is protected by the provision of the Constitution of the United States forbidding the impairment of the obligation of contract. No decision of your Honorable Court has been found or brought to the attention of your petitioner in which this question has been directly presented. Cases have come before your Honorable Court involving the validity of statutes of States granting immunity from the exercise of the State's power of eminent domain, but in none of such cases was there found to be a contract based upon a legal and valid consideration. The judg-
51 ment of the Supreme Court of Pennsylvania, if permitted to stand, will work irreparable injury to your petitioner. The question presented by this Appeal is of importance generally, inasmuch as it has to do with the rules of law respecting title to real property.

Wherefore, your petitioner prays that a Writ of Error may be allowed and issued to the Supreme Court of Pennsylvania to bring up to the Supreme Court of the United States for review the said

order and judgment of the said Supreme Court of the State of Pennsylvania affirming said Decree entered by the Court of Common Pleas No. 5, of Philadelphia County, State of Pennsylvania, and that your petitioner may have such other and further relief in the premises as may be just.

And your petitioner will ever pray, &c.

THE CONTRIBUTORS TO THE PENNSYLVANIA HOSPITAL.
By JOHN T. LEWIS, JR., *President*.

52 STATE OF PENNSYLVANIA,
County of Philadelphia, ss:

John T. Lewis, Jr., being duly sworn according to law, deposes and says that he is the President of the Contributors to the Pennsylvania Hospital, the petitioner above named; that he makes this Affidavit for and on its behalf; that he is familiar with the facts set forth in the foregoing petition, and that the facts so set forth are true.

JOHN T. LEWIS, JR.

Sworn to and subscribed before me this 6th day of November, 1916.

[Seal Wm. H. Whitaker, Notary Public, Philadelphia, Pa.]

[SEAL.] WM. H. WHITAKER,
Notary Public.

Commission expires March 9, 1919.

53 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the Honorable the Judges of the Supreme Court of the State of Pennsylvania, Greeting:

[Seal of the Supreme Court of the United States.]

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Supreme Court before you, or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between The Contributors to the Pennsylvania Hospital, Plaintiff in Error, and The City of Philadelphia, Thomas B. Smith, Mayor, George E. Datesman, Director of the Department of Public Works, and William H. Connell, Chief of the Bureau of Highways of the said City, Defendants in Error, wherein was drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision was against their validity; or wherein was drawn in question the validity of a statute of, or an authority exercised under, said State, on the ground of their being repugnant to Constitution, treaties, or laws of the United States, and the decision was in favor of such their validity; or wherein any title, right, privi-

lege, or immunity was claimed under the Constitution, or
54 any treaty or statute of, or commission held or authority exercised under, the United States, and the decision was against the title, right, privilege, or immunity especially set up or claimed under such Constitution, treaty, statute, commission, or authority; a manifest error hath happened to the great damage of the said plaintiff in error, The Contributors to the Pennsylvania Hospital, as by its complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within thirty days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness the Honorable Edward D. White, Chief Justice of the United States, the twenty-ninth day of November, in the year of our Lord one thousand nine hundred and sixteen.

JAMES D. MAHER,
Clerk of the Supreme Court of the United States.

Allowed by
MAHLON PITNEY,
Associate Justice of the
Supreme Court of the United States.

[Endorsed:] Supreme Court of the United States. October Term, 1916. The Contributors to the Pennsylvania Hospital vs. The City of Philadelphia et al. Writ of Error. Filed Dec. 14, 1916, in Supreme Court.

55 UNITED STATES OF AMERICA, *ss:*

To the City of Philadelphia, Thomas B. Smith, Mayor; George E. Datesman, Director of the Department of Public Works, and William H. Connell, Chief of the Bureau of Highways of said City, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within thirty days from the date hereof, pursuant to a writ of error, filed in the Clerk's Office of the Supreme Court of the State of Pennsylvania wherein The Contributors to the Pennsylvania Hospital is plaintiff in error and you are defendants in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Mahlon Pitney, Associate Justice of the

Supreme Court of the United States, this twenty-ninth day of November, in the year of our Lord one thousand nine hundred and sixteen.

MAHLON PITNEY,
Associate Justice of the Supreme Court of the United States.

56 I hereby accept service of the within Citation on behalf of the City of Philadelphia, Thomas B. Smith, Mayor, George E. Datesman, Director, Department of Public Works, and William H. Connell, Chief of the Bureau of Highways, of said City, defendants in error.

JOHN P. CONNELLY,
City Solicitor, Attorney for Defendants in Error.

December 14th, 1916.

Enter my appearance for the Defendants in Error.

JOHN P. CONNELLY,
City Solicitor.

December 14th, 1916.

Filed Dec. 14, 1916, in Supreme Court.

57 Know all men by these presents, that we, The Contributors to the Pennsylvania Hospital, a corporation of the State of Pennsylvania, as principal, and United States Fidelity and Guaranty Company, as sureties, are held and firmly bound unto City of Philadelphia, Thomas B. Smith, Mayor, George E. Datesman, Director of the Department of Public Works, and William H. Connell, Chief of the Bureau of Highways of the said City, in the full and just sum of Five hundred dollars, to be paid to the said City of Philadelphia, Thomas B. Smith, Mayor, George E. Datesman, Director of the Department of Public Works, and William H. Connell, Chief of the Bureau of Highways of the said City, certain attorney, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents. Sealed with our seals and dated this 29th day of November, in the year of our Lord one thousand nine hundred and sixteen.

Whereas, lately at a term (January Term, 1916, No. 155) of the Supreme Court of the State of Pennsylvania in a suit depending in said Court, between The Contributors to the Pennsylvania Hospital, as plaintiff, and City of Philadelphia, Thomas B. Smith, Mayor, George E. Datesman, Director of the Department of Public Works, and William H. Connell, Chief of the Bureau of Highways of the said City, as defendants, a decree was rendered against the said The Contributors to the Pennsylvania Hospital, and the said The Contributors to the Pennsylvania Hospital having obtained a writ of error and filed a copy thereof in the Clerk's Office of the said Court to reverse the decree in the aforesaid suit, and a citation
58 directed to the said City of Philadelphia, Thomas B. Smith, Mayor, George E. Datesman, Director of the Department of

Public Works, and William H. Connell, Chief of the Bureau of Highways of the said City, citing and admonishing them to be and appear at a Supreme Court of the United States, at Washington, within thirty days from the date thereof.

Now, the condition of the above obligation is such, That if the said The Contributors to the Pennsylvania Hospital shall prosecute said writ of error to effect, and answer all damages and costs if it fail to make its plea good, then the above obligation to be void; else to remain in full force and virtue.

THE CONTRIBUTORS TO THE PENNSYLVANIA HOSPITAL,
By JOHN T. LEWIS, JR., *President.*

Attest:
PARKER S. WILLIAMS,
Secretary.

UNITED STATES FIDELITY & GUARANTY CO.,
By HENRY STROUSE, *Res. Vice-Pres.*

Attest:
WINFRIED S. CALDWELL,
Resident Sec't'ry.

Sealed and delivered in the presence of:
E. Y. HARTSHORNE.
FRANK J. SMITH.

Approved by
MAHLON PITNEY,
Associate Justice of the Supreme Court of the United States.

59 In the Supreme Court of the United States, Term 1916.

No. —.

THE CONTRIBUTORS TO THE PENNSYLVANIA HOSPITAL, Plaintiff in Error,
vs.
CITY OF PHILADELPHIA, THOMAS B. SMITH, Mayor; GEORGE E. Datesman, Director of the Department of Public Works, and William H. Connell, Chief of the Bureau of Highways of the said City, Defendants in Error.

Prayer for Reversal.

And now, come the Contributors to the Pennsylvania Hospital, the Plaintiff in Error, and pray for a reversal of the judgment of the Supreme Court of the State of Pennsylvania in the proceeding in equity brought by The Contributors to the Pennsylvania Hospital,

as plaintiff, against City of Philadelphia, Thomas B. Smith, Mayor; George E. Datesman, Director of the Department of Public Works, and William H. Connell, Chief of the Bureau of Highways of said City, as defendants, which judgment was entered by the Supreme Court of Pennsylvania on July 1st, 1916, in affirmance of a final decree of the Court of Common Pleas No. 5, of Philadelphia County, Pennsylvania, entered March 24th, 1916; and The Contributors to the Pennsylvania Hospital also pray for a reversal of said final decree entered in said proceeding by the Court of Common
60 Pleas No. 5 of Philadelphia County on March 24th, 1916; and The Contributors to the Pennsylvania Hospital also pray for a reversal of the interlocutory decree entered in said proceeding by said Court of Common Pleas No. 5 of Philadelphia County on March 17th, 1916.

BIDDLE, PAUL & JAYNE,
ROBERTS, MONTGOMERY & McKEEHAN,
Attorneys for Plaintiffs in Error.

December 14, 1916.

60½ [Endorsed:] In the Supreme Court of the United States, Term 1916. No. —. The Contributors to the Pennsylvania Hospital, Plaintiff in Error, vs. City of Philadelphia, Thomas B. Smith, Mayor; George E. Datesman, Director of the Department of Public Works, and William H. Connell, Chief of the Bureau of Highways of the said City, Defendants in Error. Prayer for Reversal. Filed Dec. 14, 1916. In Supreme Court. Biddle, Paul & Jayne; Roberts, Montgomery & McKeehan, Attorneys for Plaintiff in Error.

61 In the Supreme Court of the United States, Term 1916.

No. —.

THE CONTRIBUTORS TO THE PENNSYLVANIA HOSPITAL, Plaintiff in Error,

vs.

CITY OF PHILADELPHIA, THOMAS B. SMITH, Mayor; GEORGE E. Datesman, Director of the Department of Public Works, and William H. Connell, Chief of the Bureau of Highways of the said City, Defendants in Error.

Assignments of Error.

Filed Dec. 14, 1916. In Supreme Court.

Biddle, Paul & Jayne; Roberts, Montgomery & McKeehan, Attorneys for Plaintiff in Error.

Supreme Court of the United States, — Term, 1916.

No. —.

E CONTRIBUTORS TO THE PENNSYLVANIA HOSPITAL, Plaintiff in Error,

vs.

E CITY OF PHILADELPHIA, THOMAS B. SMITH, Mayor; GEORGE E. Datesman, Director of the Department of Public Works; and William H. Connell, Chief of the Bureau of Highways of the said City, Defendants in Error.

Assignments of Error.

And Now, Nov. 24th, 1916, the Contributors to the Pennsylvania Hospital, plaintiff in error, make and file these Assignments of Error:

1. The Supreme Court of Pennsylvania erred in affirming the Decree of the Court of Common Pleas, No. 5, of Philadelphia County, Pennsylvania, whereby both Courts decided and held that the Act of Pennsylvania of April 17th, 1854, did not deprive the City of Philadelphia, acting under the authority of the State of Pennsylvania, by virtue of the Act of June 8th, 1881 (P. L. 68), declaratory of the Act of May 23d, 1874 (P. L. 235), from exercising the right of eminent domain in the matter of opening streets through the property of plaintiff in error.

63 2. The Supreme Court of Pennsylvania erred in affirming the Decree of the Court of Common Pleas, No. 5, of Philadelphia County, Pennsylvania, whereby both Courts decided and held that the Ordinance of the City of Philadelphia of December 18th, 1913, and the proceedings thereunder, were valid and legal and did not constitute a violation of Article I, Section 10 of the Constitution of the United States.

3. The Supreme Court of Pennsylvania erred in affirming the Decree of the Court of Common Pleas, No. 5, of Philadelphia County, Pennsylvania, whereby both Courts decided and held that the action of the City of Philadelphia in opening Forty-fourth Street through the property of the plaintiff in error did not constitute a violation of Article I, Section 10 of the Constitution of the United States.

4. The Supreme Court of Pennsylvania erred in affirming the decree of the Court of Common Pleas No. 5, of Philadelphia County, Pennsylvania. A copy of the opinion and decision, rendered July 1st, 1916, of the Supreme Court of Pennsylvania is as follows:

"Per Curiam:

"Conceding that the Act of April 17th, 1854, P. L. 385, became a contract on the part of the State with the Contributors to the Pennsylvania Hospital, it must yield to the demand of the sovereign, 'for all persons hold their property subject to the requisitions for the

public service': In re Twenty-second Street, 102 Pa. 108; and 'o legislature cannot grant away the State's right of eminent domain as to bind future legislatures'; Commonwealth vs. Rap. Tr. St. R Co., 219 Pa. 11. In dismissing appellant's bill, the learned cha cellor below but followed the recognition given in all jurisdictions the sovereign right of the State to take every species of property wh needed for public use. In so taking a contract the State does n impair its obligation, for it makes compensation therefor
64 the party from whom its enjoyment is taken. 'The cons tutional inhibition upon any State law impairing the ob gation of contracts is not a limitation upon the power of emine domain. The obligation of a contract is not impaired when it appropriated to a public use and compensation made therefor. Su an exertion of power neither challenges its validity nor impairs obligation. Both are recognized, for it is appropriated as an existi enforceable contract. It is a taking, not an impairment of its ob gation. If compensation be made, no constitutional right is violate All of this has been so long settled as to need only the citation of some of the many cases. Charles River Bridge Co. vs. Warren Bridge, 11 Pet. 420; The West River Bridge Co. vs. Dix, 6 How. 507; N. O. Gas Co. vs. La. Light Co., 115 U. S. 650; Long Island Water Supply Co. vs. Brooklyn, 166 U. S. 685; Offield vs. Railroad Co., 203 U. S. 372.

"Every contract, whether between the State and an individual or between individuals only, is subject to this general law. There enters into every engagement the unwritten condition that it is subordinate to the right of appropriation to a public use. The West River Bridge Co. vs. Dix, 6 How. 597; Long Island Water Supply Co. vs. Brooklyn, 166 U. S. 691-2.' The City of Cincinnati vs. Louisville & Nashville Railroad Co., 223 U. S. 390.

"Decree affirmed at appellant's costs."

BIDDLE, PAUL & JAYNE,
ROBERTS, MONTGOMERY & McKEEHAN,
Attorneys for Plaintiff in Error.

ROBERTS, MONTGOMERY & McKEEHAN.

POOR COPY

65 In the Supreme Court of Pennsylvania, January Term, 1916.

No. 155.

THE CONTRIBUTORS TO THE PENNSYLVANIA HOSPITAL, Plaintiff in Error,

vs.

CITY OF PHILADELPHIA, THOMAS B. SMITH, Mayor; GEORGE E. Datesman, Director of the Department of Public Works, and William H. Connell, Chief of the Bureau of Highways of the said City, Defendants in Error.

Stipulation Specifying the Portions of Record Which Shall Constitute the Transcript of Record Sur Writ of Error.

And now, December 15th, 1916, it is hereby agreed and stipulated by and between Counsel for The Contributors to the Pennsylvania Hospital, Plaintiff in Error, and City of Philadelphia, Thomas B. Smith, Mayor; George E. Datesman, Director of the Department of Public Works, and William H. Connell, Chief of the Bureau of Highways of the said City, Defendants in Error, that the following portions of the record shall constitute the transcript of record on the writ of error of the Supreme Court of the United States to the Supreme Court of Pennsylvania in the above entitled cause:

1. Docket Entries of the Court of Common Pleas No. 5, December Term, 1915, No. 2883.
2. Bill in Equity.
3. Answer of Defendants.

66 4. Findings of Fact, Conclusions of Law, and Opinion of said Court of Common Pleas entered March 17th, 1916.

5. Decree of said Court of Common Pleas entered on March 17th, 1916.
6. Exceptions of the Plaintiffs.
7. Final Decree of said Court of Common Pleas, entered March 24th, 1916.
8. Docket Entries of the Supreme Court of Pennsylvania.
9. Assignments of Error filed in said Supreme Court.
10. Opinion and Decree of said Supreme Court filed July 1st, 1916.
11. Petition for Writ of Error.
12. Writ of Error.
13. Citation and Service of same.
14. Copy of Bond.
15. Prayer for Reversal.
16. Assignments of Error of Plaintiff in Error.
17. This Stipulation.

BIDDLE, PAUL & JAYNE,
ROBERTS, MONTGOMERY & McKEEHAN,
Attorneys for Plaintiff in Error.
JOHN P. CONNELLY, *City Solicitor,*
Attorney for Defendants in Error.

December 15th, 1916.

67 [Endorsed:] No. 155, Jan. T. 1916. In the Supreme Court of Pennsylvania. The Contributors to the Pennsylvania Hospital, Plaintiff in Error, vs. City of Philadelphia, Thomas B. Smith, Mayor; George E. Datesman, Director of the Department of Public Works, and William H. Connell, Chief of the Bureau of Highways of the said City, Defendants in Error. Stipulation specifying the portions of Record which shall constitute the Transcript of Record Sur Writ of Error. Filed Dec. 16, 1916 in Supreme Court. Biddle, Paul & Jayne, Roberts, Montgomery & McKeehan, Attorneys for Plaintiff in error.

68 I, J. Hay Brown, Chief Justice of the Supreme Court of Pennsylvania, do hereby certify, That William A. Stone was, at the time of signing the annexed attestation, and now is, Prothonotary of the said Supreme Court of Pennsylvania, in and for the Eastern District, to whose acts, as such, full faith and credit are and ought to be given; and that the said attestation is in due form.

In Witness Whereof, I have hereunto subscribed my name this 16th day of December one thousand nine hundred and sixteen.

J. HAY BROWN,
Chief Justice.

I, William A. Stone, Prothonotary of the Supreme Court of Pennsylvania, in and for the Eastern District, do certify, That the Honorable J. Hay Brown by whom the foregoing Certificate was made and given, was, at the time of making and giving the same, and is now, Chief Justice of the Supreme Court of Pennsylvania; to whose acts, as such, full faith and credit are and ought to be given, as well in Courts of Judicature as elsewhere; and that his signature, thereto subscribed, is genuine.

In Testimony Whereof, I have hereunto set my hand and affixed the Seal of the said Supreme Court of Pennsylvania, in and for the *the* Eastern District, at Philadelphia, this 16th day of December one thousand nine hundred and sixteen.

[Seal of the Supreme Court of Pennsylvania, Eastern District, 1776.]

WILLIAM A. STONE,
Prothonotary.

69 STATE OF PENNSYLVANIA,
Eastern District:

I, William A. Stone, Prothonotary of the Supreme Court of Pennsylvania, in and for the Eastern District, do hereby certify that the above and foregoing is a true copy of the Record as stipulated in the above entitled cause, so full and entire as appears of Record in said Court.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said Court at Philadelphia, this 21st day of December, A. D. 1916.

[Seal of the Supreme Court of Pennsylvania, Eastern District, 1776.]

WILLIAM A. STONE,
Prothonotary,

Per R. M. S.

Endorsed on cover: File No. 25,667. Pennsylvania Supreme Court. Term No. 837. The Contributors to the Pennsylvania Hospital, plaintiff in error, vs. The City of Philadelphia et al. Filed December 29th, 1916. File No. 25,667.

Office Supreme Court, U. S.
FILED
MAY 16 1917
JAMES D. MAHER
CLERK

GENERAL No. 25667,
TERM No. [redacted]349 OCTOBER TERM, 1916.

IN THE

Supreme Court of the United States

THE CONTRIBUTORS TO THE PENNSYLVANIA HOSPITAL, Appellant,

vs.

THE CITY OF PHILADELPHIA *ET AL.*, Appellees.

MOTION TO ADVANCE CAUSE.

ERNEST LOWENGRUND,
Assistant City Solicitor,
JOHN P. CONNELLY,
City Solicitor,
Attorneys for Appellees,
BIDDLE, PAUL & JAYNE,
ROBERTS, MONTGOMERY & McKEEHAN,
Attorneys for Appellant.

ALLEN, LANE & SCOTT, PRS., PHILADELPHIA.

IN THE

Supreme Court of the United States.

GENERAL NO. 25667. TERM NO. 837.
OCTOBER TERM, 1916.

The Contributors to the Pennsylvania Hospital, Appellant,

vs.

The City of Philadelphia, et al., *Appellees.*

MOTION TO ADVANCE CAUSE.

Now come the appellees in the above entitled cause and move the Court to advance said cause for the reasons set forth in the following

---

BRIEF STATEMENT OF THE MATTER INVOLVED.

The appellant is a corporation organized and existing under the laws of the Commonwealth of Pennsylvania, and is the owner of a certain lot or piece of ground situate in the Twenty-fourth Ward of the City of Philadelphia, bounded on the north by Haverford Avenue, on the east by Forty-second Street, on the west by Forty-ninth Street, and on the south by Market Street and Powelton Avenue, which

property was purchased by the appellant in 1836 and upon which appellant has maintained since 1841 and does now maintain a Hospital for the Insane.

That by an Act of the General Assembly of the Commonwealth of Pennsylvania dated April 17th, 1854 (P. L. 385), it was provided as follows:—

> "SECTION 1. Be it enacted, &c. That no streets, alleys, roads or lanes shall ever be opened through the property belonging to the corporation of the contributors to the Pennsylvania Hospital situate in the Twenty-fourth Ward of the City of Philadelphia, without the consent of the said corporation, so long as the said property is used for the purposes of their insane department, any law to the contrary notwithstanding: Provided that said corporation shall contribute one-half the ground for an avenue, on their east, one on their west line, each one hundred feet in width, without charge to the City and County of Philadelphia."

That the said strips of ground were duly dedicated by the appellant and accepted by the City of Philadephia, and have since been and are now laid out as public streets.

That by an Act of the Commonwealth of Pennsylvania of June 8th, 1881 (P. L. 68), which is declaratory of the Act of May 23rd, 1874 (P. L. 235), it is provided as follows:—

> "SECTION 13. That the municipal authorities and Courts having jurisdiction in any city of this Commonwealth, shall have exclusive control and direction of the opening, widening, narrowing, vacating and changing grades of all streets, alleys, and highways within the limits of such city, and may open or widen streets, at such points, and of such width, as may be deemed necessary by such city authorities and Courts, *any private or special statute to the contrary notwithstanding;* proceedings to be had in such cases as are now re-

quired by law. Streets commenced under any special authority shall be completed unless otherwise decided by Councils, and any of said cities may, with the consent of the Courts of Quarter Sessions of the proper county, enter security for damages to private property by reason of street improvements, in such sum or sums as the said Courts may direct."

That the following Ordinance was passed by the Select and Common Councils and approved by the Mayor of the City of Philadelphia, on December 18th, 1913, (Ordinances 1913, page 353):—

"SECTION 1. The Select and Common Councils of the City of Philadelphia do ordain, That the Department of Public Works be authorized and directed to notify the owners of property over and through which Forty-fourth Street, from Market Street to Haverford Avenue, will pass, that at the expiration of three months from the date of said notice said street will be required for public use.

"SECTION 2. The Mayor of the City is hereby authorized and directed to enter security, on behalf of the City of Philadelphia for the payment of any damages which may be assessed by reason of the opening of said street; upon the filing of said bond, and at the expiration of the said three months, the Director of the Department of Public Works shall forthwith proceed to open said street."

That subsequently to the passage of said Ordinance proceedings were instituted in the Court of Quarter Sessions of Philadelphia County under the General Road law of the State, to condemn the said property required for the opening of the said Forty-fourth Street, under the general power of eminent domain.

That on January 18th, 1916, after the commencement of the said proceedings, the appellant filed a Bill in Equity in the Court of Common Pleas No. 5, of Philadelphia County

to restrain appellees from opening the said street, upon the ground that the opening of such street would be contrary to the provisions of the Constitution of the State of Pennsylvania and the Constitution of the United States, and impair the obligation of the contract entered into between the appellant and the State of Pennsylvania evidenced by the said Act of Assembly approved April 17th, 1854.

That the appellees filed an answer to the said Bill and the cause was proceeded with in the said Court of Common Pleas No. 5 of Philadelphia County, and on March 17th, 1916, the said Bill of Complaint was dismissed.

Upon appeal to the Supreme Court of the State of Pennsylvania the decision of the said Court of Common Pleas No. 5 of Philadelphia County dismissing the said Bill was affirmed, the opinion filed in the said cause being as follows:

> "Conceding that the Act of April 17th, 1854, P. L. 385, became a contract on the part of the State with the contributors to the Pennsylvania Hospital, it must yield to the demand of the sovereign 'for all persons hold their property subject to the requisitions for the public service' In *re* Twenty-second Street, 102 Pa. 108; and 'one legislature cannot grant away the State's right of eminent domain so as to bind future legislatures': Commonwealth *vs.* Rap. Tr. St. Ry. Co. 219 Pa. 11. In dismissing Appellant's Bill, the learned chancellor below but followed the recognition given in all jurisdictions to the sovereign right of the State to take every species of property when needed for public use. In so taking a contract the State does not impair its obligation, for it makes compensation therefor to the party from whom its enjoyment is taken. 'The constitutional inhibition upon any State law impairing the obligation of contracts is not a limitation upon the power of eminent domain. The obligation of a contract is not impaired when it is appropriated to a public use and compensation made therefor. Such an exertion of power neither challenges its validity nor impairs its obligation. Both are recognized, for it is appropria-

ated as an existing enforceable contract. It is a taking, not an impairment of its obligation. If compensation be made, no constitutional right is violated. All of this has been so long settled as to need only the citation of some of the many cases. Charles River Bridge *vs.* Warren Bridge, 11 Pet. 420; The West River Bridge Co. *vs.* Dix., 6 How. 507, N. O. Gas Co. *vs.* La. Light Co., 115 U. S. 650; Long Island Water Supply Co. *vs.* Brooklyn, 166 U. S. 685; Offeld *vs.* Railroad Co., 203 U. S. 372.

" 'Every contract, whether between the State and an individual or between individuals only, is subject to this general law. There enters into every engagement the unwritten condition that it is subordinate to the right of appropriation to a public use. The West River Bridge Co. *vs.* Dix, 6 How. 507; Long Island Water Supply Co. *vs.* Brooklyn, 166 U. S. 691-2'; The City of Cincinnati *vs.* Louisville and Nashville Railroad Company, 223 U. S. 390.

"Decree affirmed at appellant's costs."

From this decision the appellant has appealed to this Court.

The question involved, therefore, in the said cause, is the right of the City of Philadelphia and its officials—appellees—under the power of eminent domain to open Forty-fourth Street, from Market Street to Haverford Avenue in the said City, through the land of the Contributors to the Pennsylvania Hospital, appellant.

That the said tract of land owned by the appellant as above, extends from Forty-second Street to Forty-ninth Street, and is intersected by no streets except Forty-sixth Street, from Market Street to Haverford Avenue; Forty-third, Forty-fourth, Forty-fifth, Forty-seventh and Forty-eighth Streets remaining unopened; that from Forty-second Street to Forty-sixth Street is a distance of 2030 feet, and from Forty-sixth to Forty-ninth Street is a distance of

1728 feet,—the regular and ordinary distance between such streets in the City of Philadelphia is 450 feet.

That in the neighborhood and vicinity of the said tract of land the population of the City of Philadelphia has become very large and that the progressive increase thereof is being constantly maintained. That on all sides of the said tract of land this increase of population is taking place. That Market Street is the principal street of the City of Philadelphia, and that traffic between the sections on the northern and southern sides of the said tract of land is very great and can now only be carried on through the said Forty-sixth Street. The situation demands alleviation, and important interests of the City suggest prompt action, and its officials deem it of great importance to vital concerns of the City that the determination of the matters involved be reached at as early a date as possible.

WHEREFORE the appellees move the Court that the said cause may be advanced.

Notice of this motion has been served on opposing counsel.

Respectfully submitted,

ERNEST LOWENGRUND,
Assistant City Solicitor,

JOHN P. CONNELLY,
City Solicitor.
Attorneys for Appellees.

Notice of the presentation of the foregoing Petition is hereby accepted on behalf of the appellant, which joins in the petition to advance the cause for argument.

BIDDLE, PAUL & JAYNE,
ROBERTS, MONTGOMERY & MCKEEHAN,
Attorneys for Appellant.

FILED
SEP 20 1917
JAMES D. MAHER
CLERK

NO. 348

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1917

No. 349.

THE CONTRIBUTORS TO THE PENNSYLVANIA HOSPITAL,
Plaintiff in Error,

vs.

THE CITY OF PHILADELPHIA, THOMAS B. SMITH, Mayor; GEORGE E. DATESMAN, Director of the Department of Public Works; WILLIAM H. CONNELL, Chief of the Bureau of Highways,
Defendants in Error.

IN ERROR TO THE SUPREME COURT OF THE STATE OF PENNSYLVANIA.

BRIEF FOR THE CONTRIBUTORS TO THE PENNSYLVANIA HOSPITAL, PLAINTIFF IN ERROR.

STATEMENT OF THE CASE.

1. The Facts.

The plaintiff in error is a charitable corporation chartered by a special Act of Assembly of Pennsylvania. In 1841 it established an hospital for the care

of the insane on a large tract in West Philadelphia. It became apparent that its work would be hindered, if not rendered impracticable, if streets were to be opened through its grounds. The managers memoralized the Legislature upon this point. The Legislature passed an act (Pamph. Laws, Pa. 1854, p. 385), which is:

"AN ACT

"To prevent streets being laid out through the grounds of the Pennsylvania Hospital, without the consent of the Managers.

"Section 1. Be it enacted by the Senate and House of Representatives of the Commonwealth of Pennsylvania in General Assembly met, and it is hereby enacted by the authority of the same, That no streets, alleys, roads or lanes, shall ever be opened through the property belonging to the corporation of the contributors to the Pennsylvania Hospital, situate in the twenty-fourth ward of the City of Philadelphia, without the consent of the said corporation, so long as the said property is used for the purposes of their insane department, any law to the contrary notwithstanding: PROVIDED, That said corporation shall contribute one-half the ground, for an avenue, on their east, one on their west line, each one hundred feet in width, without charge to the City and County of Philadelphia."

The hospital duly accepted the Act, and pursuant thereto, by deed dedicated to the city the ground for

the avenues in the Act mentioned, which dedication the city accepted and still uses said avenues.

May 23, 1874, an Act was passed (Pamph. Laws, Pa. 1874, p. 235) which provided, *inter alia:*

> "Section 13. That the municipal authorities and courts having jurisdiction in any city of this commonwealth, shall have exclusive control and direction of the opening, widening, narrowing, vacating and changing grades of all streets, alleys and highways within the limits of such city, and may open or widen streets of such width as may be deemed necessary by such city authorities and courts; proceedings to be had in such cases as are now required by law."

June 8, 1881, an Act was passed (Pamph. Laws, Pa. 1881, p. 68, Purdon's Pa. Digest, Vol. 3, p. 2730), which provided, *inter alia:*

> "The municipal authorities and courts having jurisdiction in any city of this Commonwealth shall have exclusive control and direction of the opening, etc., of all streets, etc., within the limits of such city * * * any private or special statute to the contrary notwithstanding, proceedings to be had in such cases as are now required by law."

By ordinance of December 18, 1913 (Trans. 3), the councils of Philadelphia decided to take the ground necessary for a street which would pass through the centre of the hospital tract. The proper executive officers of the city duly notified the corporation of

the intended taking, and, in accordance with the statutes of Pennsylvania, the city filed in court its petition for leave to file its bond to pay the hospital such compensation as might be awarded. The court made an order that the city's bond should cover not only the value of the land to be taken, but the value of the contract, and against the protest of the hospital, the condemnation proceeding went forward.

The damages having been thus secured, it became possible for the city physically to enter the hospital's grounds and build the proposed street. In the condemnation proceedings the hospital had no redress except to receive any money damages it might have been awarded for the destruction of its property rights.

Its only redress, therefore, was to file a bill to restrain the violation of its contract and to enjoin the city from entering on its lands.

2. The Proceedings.

Accordingly the hospital filed its bill reciting the facts as above (Trans. 2). The city answered (Trans. 6) admitting, or failing to deny, all of the averments of fact of the bill, and setting up the following legal defenses (Trans. 8-9):

(a) That plaintiff will not suffer irreparable damage, because it will be compensated in the condemnation proceedings for the impairment of its contract.

(b) That the opening of the street will not constitute an impairment of the obligation of the contract.

(c) That if the Act of 1854 be given the effect of forbidding the opening of the street it was beyond the power of the legislature, unconstitutional and void.

(d) That plaintiff is precluded from filing this bill because concluded by the condemnation proceedings.

The Chancellor held that the Act of 1854 did not prevent the city from proceeding to open the street under the authority of the later Acts of 1874 and 1881 (Trans. 14), and hence that plaintiff's remedy for the taking of its contract was full and complete in the condemnation proceedings (Trans. 14). Further, that the ordinance and proceedings thereunder are valid, and do not violate Art. I, Sec. 10 of the Constitution of the United States (Trans. 14).

He held that, "if the contract in this case were binding upon the Commonwealth of Pennsylvania then, of course, this bill would lie, because the damage resulting from the city's proceeding with the physical work of opening the street through plaintiff's land will be irreparable. The condemnation proceeding, whose purpose is to assess the plaintiff's damage for the opening of the street and the taking their contract with the State, would be wholly inadequate if it were the plaintiff's right specifically to enforce the alleged contract with the State arising

out of the Act of 1854" (Trans. 15).

He felt himself bound, by certain cases decided in Pennsylvania, to hold that all the plaintiff was entitled to was the assessment of the value of its land taken, plus the value of its contract, and hence that its remedy in the condemnation proceeding was adequate (Trans. 15). He dismissed the bill (Trans. 15).

On appeal the Supreme Court of Pennsylvania affirmed the decree dismissing the bill (Trans. 21). It held, following certain of its own decisions, and citing certain cases in this Court, that, conceding the Act of 1854 constituted a contract, it was subject to the state's power of eminent domain and that the proposed taking did not constitute an impairment of its obligation (Trans. 20).

3. The Question Involved.

Where a State has agreed, for a valid consideration, that it will not exercise the power of eminent domain in a particular specified way against certain private property, and where such agreement is limited in its operation, reasonable, and not repugnant to natural justice, is not such an agreement valid and within the protection of Article I, Section 10, of the Federal Constitution?

4. The Errors Assigned and Relied Upon.

1. The Supreme Court of Pennsylvania erred in affirming the decree of the Court of Common Pleas, No. 5, of Philadelphia County, Pennsylvania, whereby both courts decided and held that the Act of Pennsylvania of April 17th, 1854, did not deprive the city of Philadelphia, acting under the authority of the state of Pennsylvania, by virtue of the Act of June 8th, 1881 (P. L. 68), declaratory of the Act of May 23d, 1874 (P. L. 235), from exercising the right of eminent domain in the matter of opening streets through the property of plaintiff in error.

2. The Supreme Court of Pennsylvania erred in affirming the decree of the Court of Common Pleas, No. 5, of Philadelphia County, Pennsylvania, whereby both Courts decided and held that the ordinance of the city of Philadelphia of December 18th, 1913, and the proceedings thereunder, were valid and legal and did not constitute a violation of Article I, Section 10 of the Constitution of the United States.

3. The Supreme Court of Pennsylvania erred in affirming the decree of the Court of Common Pleas, No. 5, of Philadelphia County, Pennsylvania, whereby both courts decided and held that the action of the City of Philadelphia in opening Forty-fourth Street through the property of the plaintiff in error did not constitute a violation of Article I, Section 10 of the Constitution of the United States.

4. The Supreme Court of Pennsylvania erred in affirming the decree of the Court of Common Pleas, No. 5, of Philadelphia County, Pennsylvania. A copy of the opinion and decision, rendered July 1st, 1916, of the Supreme Court of Pennsylvania is as follows:

"*Per Curiam:*

"Conceding that the Act of April 17th, 1854, P. L. 385, became a contract on the part of the State with the Contributors to the Pennsylvania Hospital, it must yield to the demand of the sovereign, 'for all persons hold their property subject to the requisitions for the public service:' *In re* Twenty-second Street, 102 Pa. 108; and 'one legislature cannot grant away the State's right of eminent domain so as to bind future legislatures;' Commonwealth vs. Rap. Tr. St. Ry. Co., 219 Pa. 11. In dismissing appellant's bill, the learned chancellor below but followed the recognition given in all jurisdictions to the sovereign right of the State to take every species of property when needed for public use. In so taking a contract the State does not impair its obligation, for it makes compensation therefor to the party from whom its enjoyment is taken. 'The constitutional inhibition upon any State law impairing the obligation of contracts is not a limitation upon the power of eminent domain. The obligation of a contract is not impaired when it is appropriated to a public use and compensation made therefor. Such an exertion of

power neither challenges its validity nor impairs its obligation. Both are recognized, for it is appropriated as an existing enforceable contract. It is a taking, not an impairment of its obligation. If compensation be made, no constitutional right is violated. All of this has been so long settled as to need only the citation of some of the many cases. Charles River Bridge Co. vs. Warren Bridge, 11 Pet. 420; The West River Bridge Co. vs. Dix, 6 How. 507; N. O. Gas Co. vs. La. Light Co., 115 U. S. 650; Long Island Water Supply Co. vs. Brooklyn, 166 U. S. 685; Offield vs. Railroad Co., 203 U. S. 372.

"Every contract, whether between the State and an individual or between individuals only, is subject to this general law. There enters into every engagement the unwritten condition that it is subordinate to the right of appropriation to a public use. The West River Bridge Co. vs. Dix, 6 How. 507; Long Island Water Supply Co. vs. Brooklyn, 166 U. S. 691-2.' The City of Cincinnati vs. Louisville & Nashville Railroad Co., 223 U. S. 390.

"Decree affirmed at appellant's costs."

V. ARGUMENT.

Preliminary Statement.

We can, we believe, clarify this argument by a brief definition of the real issue in the case and a reference to the fallacy which underlies the decisions of the Courts below. Because of that fallacy, the real issue in this case was not touched upon in the courts below.

The single and plain issue is, whether, in 1854, the legislature of Pennsylvania had power to make the contract upon which plaintiff relies. If it did have such power, the State may not impair that contract.

That the legislature intended to make a valid and binding contract with the Hospital is quite clear. The act is in form a contract. It provides that if the Hospital shall dedicate to the City for public use certain ground, then, so long as the Hospital's plot of ground is used for an insane hospital, no street shall be cut through it. The terms are positive and unambiguous. Nothing is left to inference. No recourse need be had to rules of construction or to presumptions.

In considering whether the legislature had, in 1854, the power to make this contract, we must remember two things. First, this legislative agreement was made to foster and assist a public charity in which the State had a vital interest,—the care of its insane. The plaintiff, one of the oldest and one of the largest charitable institutions in the United

States, has, in reliance upon this act, and in order to carry out its public work, for over sixty years lavishly expended money and given its efforts in building up a large and now famous institution on the plot of ground in question. This alone would seem under the authorities to amount to a sufficient consideration for a contract. But there was another ample consideration, given when the contract was made.

The act requires as a consideration the gift to the State (through the City) of two pieces of land lying at either edge of the plaintiff's tract, for street purposes. That land was valuable; the legislature required its dedication; the Hospital gave it; the City received it and uses it to this day.

No question is made, but that the bargain was a fair one. Good motives led to its consummation. The legislature viewed the agreement from a business standpoint as an advantageous one. Money damages for a breach of the contract would not meet the situation or do justice to the plaintiff. Assuming that such damages were to be awarded, no fair measure of them could be ascertained.

This being the situation, we repeat that the single issue in this case is the power of the legislature to make such a contract. If the legislature had that power, it is admitted that it cannot impair the obligation of the contract.

The Pennsylvania constitution of 1838, which was in force at the time the Act of 1854 was passed, delegated the whole legislative authority of the State to

the legislature, saving and excepting certain matters which were reserved to the people. None of these reservations at all touches the power to make a contract like that in question. Unless, therefore, there be some implied reservation of power in the people, which would put it beyond the authority of the legislature of 1854 to enter into such a contract, the agreement is valid, and by reason of the Constitution of the United States, is binding.

The contract does not constitute a surrender of the power of eminent domain of the State of Pennsylvania. It is extremely limited in its operation. It stipulates that only so long as the property is devoted to a certain public use, the State will not exercise its power of eminent domain in one minor particular (namely, the opening of streets), without the consent of the managers of the Hospital. It leaves the property of the plaintiff subject to be taken as a whole for any public use. It leaves the State free rein to take portions of the plaintiff's property for public uses. It is merely a covenant that so long as the plaintiff will devote its property to a public use the State will not exercise its power to cut streets through the property so as to destroy its usefulness for its present charitable purposes.

This is not an abdication of the State's sovereignty, but an exercise of it. The contract was reasonable in its terms and involves no subversion of the sovereignty of the State.

This Court has repeatedly affirmed the power of State legislatures to make contracts exempting prop-

erty under specified conditions from the exercise of certain governmental powers. Witness the cases concerning contracts collateral to titles made for public lands; those in which the power of taxation has been restricted by contract; those in which contracts with a corporation not to place a public highway within certain limits have been sustained; those in which it has been held that the legislature was competent to enter into contracts with regard to exclusive franchises and with regard to rates. In each of these classes of cases this Court has held the contract to be within the legislative power and has enforced the mandate of the constitution against its impairment.

But, say the defendants in error, the power here involved is the power to take private property for public use, commonly called the power of eminent domain. *That* cannot be restrained by contract. *That* is different from all the others.

We reply, this Court has never so said. No other court has ever so *decided* in any case where that proposition was involved in the decision of the case before it. On the contrary, this Court has held that a reasonable restriction of that power for a proper governmental purpose, by contract, is within the legislative authority as being an exercise, and not an abdication, of the sovereign power. We assert that neither the court of first instance nor the Supreme Court of Pennsylvania has decided in this case that the contract here drawn in question was beyond the legislative authority.

We have above said that the decision of the Supreme Court of Pennsylvania in this case rests upon a fallacy. That fallacy consists in "conceding" that the plaintiff has a contract (which of course means a valid contract) with the State of Pennsylvania, and then holding that that contract may be "taken" under the power to take private property for public use.

We submit that, in order to reach this result, the decisions of this Court have been misunderstood and misapplied. It is quite true that all property, tangible and intangible alike, is subject to be so taken. This court has many times stated that any sort of property is liable to be taken and cannot be saved from being taken by the mere fact that a contract is in some way connected with the use of that property, which contract will be rendered impossible of performance by the taking of the property. This doctrine, however, is wholly inapplicable to a case where the state in the exercise of its sovereignty has entered into a contract not to take in a specific way and for a specific purpose, private property. The State here has no intention of "taking" the contract. Its intention is to take the physical property of the plaintiff in the teeth of the express stipulation of its own contract to the contrary. The very language of the Act of 1881 (*supra*, page 2), giving the city the right to open streets, "any private or special statute to the contrary notwithstanding," shows that what the State intends to do is to brush aside, ignore and abrogate the contract, and in no sense to take it.

Now, we submit, either the Act of 1854 is a contract or it is not a contract. It cannot be both. If it be a contract, then its obligation may not be impaired. If it be not a contract, it is meaningless to talk about its being taken under the power to take private property for public use.

We earnestly contend that the State is not taking two things, one a contract and the other some physical property. If the State may under the right of eminent domain take its own contract, no question of the breach or impairment of a contract by the State can ever arise. The State need only be careful not to denominate its action as a repudiation of its contract, but to aver that it is taking the contract for public use. It matters not whether it be a contract to exempt from taxation, to guarantee an exclusive franchise, or for any other governmental purpose. It may simply be taken and the taking is no breach or impairment. Such a doctrine would render Article I, Section 10 of the Constitution a mere form of words. A reading of the opinion of the Supreme Court of Pennsylvania will, we think, show that this was the position taken by that court. It conceded the existence of a contract and held that the contract might be taken. This is nothing more than to say that the contract may at will be broken and that the liability of the State is to pay damages for the breach, as any other private person would have to do should he break his contract.

We revert, then, to the proposition which we have above stated is the fundamental proposition in this

case; namely,—May the legislature of a state, in the exercise of its governmental authority and discretion, agree, for a consideration and for what it deems a public aim and proper purpose, that it will not exercise a certain governmental power in a given instance and in a specified manner?

This case is too important to this plaintiff, too important as affecting constitutional rights, to admit of an *ad captandum* argument. This fact must be our excuse for an exhaustive examination of the authorities and an extended analysis of what has actually been decided bearing upon the issue.

In elaboration, therefore, of the argument above outlined, we shall present our full argument under the following heads:

I. The Act of 1854 is a contract.

II. The legislature of Pennsylvania had the power, in 1854, to contract with the Hospital that the State, while retaining its general power of eminent domain over the Hospital's entire property, would not, while the Hospital continued to operate, destroy the integrity of its property by condemning portions of it for streets; such contract is protected from impairment by the Federal Constitution.

(a) The power vested in the legislature.

(b) The limits set to the powers of the legislature.

(c) It was competent to the legislature in 1854 to enter into the contract in question.

(d) If the legislature was vested with the power

to make the contract, it cannot be impaired by a succeeding legislature.

III. This Court has repeatedly held that a State may bind itself by contract with a particular person to limit the exercise of a specified governmental power with respect to that person's property; and that such a contract is an exercise and not an abdication of sovereignty.

(a) Contracts in respect of public lands.

(b) Contracts in respect of the taxing power.

(c) Contracts in respect of the eminent domain.

(d) Contracts respecting exclusive franchises and rates.

IV. Such contracts are strictly construed; unless it be found that there is in fact a contract, no rights accrue against the State.

V. The sweeping text-book doctrine is not borne out by the cases cited in support of it.

VI. Cases in this Court, cited by defendants in error, and relied on by the court below.

VII. The Pennsylvania cases relied on by defendants in error.

VIII. This contract cannot be "taken" as asserted by defendants in error and by the court below.

IX. There is no question here of the exercise of the police power.

X. The property of plaintiff in error is still subject to the police power and to that of eminent domain.

XI. The fact that similar questions could not now arise because the people have since seen fit to limit the power of their representatives, only adds point to the argument that the power to make this contract existed in 1854.

XII. Summary.

I. THE ACT OF 1854 IS A CONTRACT.

The act is quoted in full, page 2, *supra*. If it be a mere declaration of legislative policy, we have no case. If it constitute a mere license, granted without consideration, we have no case. But it is clearly more. It is a legislative contract. "The people" of the State of the one part bind themselves for a clearly expressed and valuable consideration given by the hospital of the other part. Moreover, it is an irrevocably **executed** contract with a continuing obligation on the part of the State, in that the State, and through the State the city, has received the consideration given by the hospital, and used that consideration since 1854. Even if an executed contract could be rescinded by the restoration of the consideration, that would be impossible here, for the tracts conveyed to the city are now public streets, which the city cannot vacate.

The consideration just mentioned is adequate. But the contract has this further support,—the grant of exemption of the grounds from streets was based on the devotion of the property to a use in which the people of the State had an interest. The great work of caring for the insane was then, and is now, a matter of public concern. In 1854 it had to be done largely by private charitable corporations. Here was such an institution, willing to do this public work in a great city, with not a penny of profit. The legislature saw that its efforts would be hampered, if

not prohibited, if its grounds should be cut up by streets. The need of a large continuous plot for the laying out and development of the institution was obvious. The legislature in effect said to the gentlemen interested in the work: "We will see that your institution—**so long, but only so long,** as you devote this land to this charitable public use, where the insane of the community are freely treated, shall not have its work hampered and destroyed, by the division of its grounds and the destruction of its buildings, for street purposes."

But we need not pursue this subject further for it is admitted by the defendants in error that this is in form and substance a contract.

II. THE LEGISLATURE OF PENNSYLVANIA HAD THE POWER, IN 1854, TO CONTRACT WITH THE HOSPITAL THAT THE STATE, WHILE RETAINING ITS GENERAL POWER OF EMINENT DOMAIN OVER THE HOSPITAL'S ENTIRE PROPERTY, WOULD NOT, WHILE THE HOSPITAL CONTINUED TO OPERATE, DESTROY THE INTEGRITY OF ITS PROPERTY BY CONDEMNING PORTIONS OF IT FOR STREETS; SUCH CONTRACT IS PROTECTED FROM IMPAIRMENT BY THE FEDERAL CONSTITUTION.

(a) The Power Vested in the Legislature.

The "State" under our form of government is "the people" of the State. The people cannot act *viva voce* upon the problems of government. They must act by agents. By their constitution, they, *inter alia*, delegate to their chosen representatives, the General Assembly, the power of legislation. Except as they restrict this power by bills of rights or by other prohibition of certain sorts of laws, the people's power, the sovereign power, without hindrance and without appeal, rests in the legislature. Within the sphere limited only by the constitution, the legislature is the State. In this sense "the State," "the people," "the Legislature" are synonymous terms.

The State governments, unlike the Federal, are

not of limited powers. It is not a question what is given, what is delegated, but what is withheld by the fundamental charter.

(b) The Limits Set to the Powers of the Legislature.

We know of but three sorts of limits which are set to the sweeping sovereign power entrusted to the people's assembly.

1. Where the people have yielded to the Federal Government a power by their compact of union; as, *e. g.* "No State shall * * * pass any * * * law impairing the obligation of contracts * * * ". In this instance the people of the State, the very source of legislative power, have irrevocably surrendered to the Federal Government one of the arms, powers and attributes of sovereignty.

2. Where the people have foregone, by their own contract of organization, a sovereign right which they, speaking through their instruments of sovereignty, their representatives, might otherwise freely have enforced, as, *e. g.* "No person shall be attainted of treason or felony by the legislature." Penna. Const. Art. I, Sec. 18.

3. Where the specific act of the legislature would be "against natural justice" or inevitably destructive of the very purpose for which government exists.

In

Calder vs. Bull, 3 Dallas, 386 (1798),

Mr. Justice Chase said:

> "It appears to me a self-evident proposition that the several State Legislatures retain all the powers of legislation delegated to them by the State Constitutions, which are not expressly taken away by the Constitution of the United States. * * * * I cannot subscribe to the omnipotence of a State Legislature * * * *. There are acts which the Federal or State Legislature cannot do without exceeding their authority. * * * * An Act of the Legislature, [for I cannot call it a law], contrary to the great first principles of the social compact, cannot be considered a rightful exercise of legislative authority. * * * A few instances will suffice to explain what I mean. A law that punished a citizen for an innocent action; * * * * a law that destroys or impairs the lawful private contracts of citizens; a law that makes a man a judge in his own cause; or a law that takes property from 'A' and gives it to 'B': it is against all reason and justice, for a people to entrust a Legislature with such powers, and, therefore, it cannot be presumed that they have done it."

(c) It was Competent to the Legislature in 1854 to Enter into the Contract in Question.

It is conceded that the Constitution of Pennsylvania (that of 1838) which was in force when the

Act of 1854 was passed, contained no prohibition against the making of this contract by the General Assembly. That this may appear beyond peradventure, we have copied the sections of that document which deal with the powers of the Legislature and the reserved powers of the people in an Appendix (p. 115).

The Legislature was, then, unhampered in the exercise of the sovereignty of the people of Pennsylvania, in deciding how, where and when streets should be laid down in the City of Philadelphia. It was at liberty to enter into this contract if it deemed it a wise business or administrative policy for the State so to do. Such a contract was forbidden neither by the constitution of the State nor by that of the Nation. It certainly was not then and is not now, in the light of experience, either violative of natural justice or subversive of the social compact.

(d) If the Legislature was Vested with the Power to make the Contract, it cannot be impaired by a succeeding Legislature.

We understand that this doctrine is also conceded, as it must be. It has never been disputed since the decision of **Fletcher vs. Peck, 6 Cranch, 87 (1810)**, that the constitution preserves from impairment the obligation of a contractual act of the Legislature. To cite cases for the proposition were a mere affectation.

Yet the city asserts that the contract here in issue

is, in effect, no contract, because (1) It was beyond the power of the legislature to make it; and (2) If the legislature had power to make it, it had the power, not to impair it, but to take it, under the doctrine of the eminent domain.

As we have already shown there is no express prohibition against the making of this contract. The phrase used by the defendants in error in the court below to the effect that "one legislature cannot bind a succeeding legislature" is answered by Chief Justice Marshall in

Fletcher vs. Peck, 6 Cranch, 87 (1810),

at page 135, as follows:

> "* * * * The principle asserted is that one legislature is competent to repeal any act which a former legislature was competent to pass; and that one legislature cannot abridge the powers of a succeeding legislature. The correctness of this principle, so far as respects general legislation, can never be controverted. But, if an act be done under a law, a succeeding legislature cannot undo it."

The argument for defendants in error must, then, come to this,—That though the legislature *apparently* had the power to make this contract in the due administration of the people's business, yet the act was subject to abrogation by reason of the so-called power of eminent domain.

It is said that the eminent domain is an attribute of sovereignty, and that the people's mandate to the leg-

islature never contemplated the surrender or the fettering of the people's sovereignty. Hence any attempt to restrict, by contract, the free exercise of that sovereignty is on its face *ultra vires*, null and void.

If this proposition be sound it must be because (a) there is a general principle that no so-called attribute of sovereignty may be surrendered, or (b) because that particular branch of the sovereignty known as the exercise of the right of eminent domain is different and of a higher and more sacred character than the other attributes.

III. THIS COURT HAS REPEATEDLY HELD THAT A STATE MAY BIND ITSELF BY CONTRACT WITH A PARTICULAR PERSON TO LIMIT THE EXERCISE OF A SPECIFIED GOVERNMENTAL POWER WITH REPECT TO THAT PERSON'S PROPERTY; AND THAT SUCH A CONTRACT IS AN EXERCISE AND NOT AN ABDICATION OF SOVEREIGNTY.

(a) Contracts in respect of Public Lands.

The earliest case which laid down the doctrine was **Fletcher vs. Peck, 6 Cranch, 87 (1810).** In that case this Court held that a title derived under an Act of Assembly of the State of Georgia could not be impaired by a subsequent Act of the legislature. It was there insisted that the legislature of Georgia could not bind future legislatures and that in annulling the title previously given by the legislature, the subsequent legislature was exercising an act of sovereignty. This argument, however, did not prevail.

In the later cases about to be referred to, it was sought to distinguish this case on the ground that the contractual obligation involved was similar to a covenant for title running with land granted by the State and that the doctrine laid down in *Fletcher vs. Peck* must be limited to such a case. This Court, however, refused so to limit it.

(b) Contracts in respect of the Taxing Power.

This Court has repeatedly held that the contractual surrender by an act of the legislature of the right to levy taxes is valid and binding upon the state and cannot be abrogated or impaired by the action of the same or a subsequent legislature.

The taxing power is one of the attributes of sovereignty. Indeed, it seems fair to say that it is the most fundamental and vital of all the powers of a sovereign. In virtue of it, the sovereign takes the property of the subject without compensation. It takes the subject's property in such manner and in such measure as to the sovereign seems wise. Save for constitutional restriction, the power of taxation is unlimited, the objects of taxation undetermined, the equality or inequality thereof unrestrained. That the power of taxation is delegated to the legislature no one can controvert. This Court has in no uncertain terms refused countenance to the doctrine that this power is impliedly limited or circumscribed.

The first decision upon this subject is

New Jersey vs. Wilson, 7 Cranch, 164 (1812).

There a remnant of the tribe of Delaware Indians had claims to a considerable portion of land in New Jersey, to extinguish which claims became an object with the government and proprietors of the Colony. The Indians agreed with the proprietors to specify particularly the lands which they claimed, to release

their claim to all other lands and to appoint certain chieftains to treat with commissioners on the part of the government for the final extinguishment of their whole claim.

A proposition was made in writing that the government should purchase a tract of land on which these Indians might reside, in consideration of which the Indians would release their claim to all other lands in New Jersey south of the Raritan River. The legislature passed an act to give effect to this agreement which provided *inter alia* "that the lands to be purchased for the Indians aforesaid shall not hereafter be subject to any tax."

In 1801 the Indians desired to migrate and applied for and obtained an act of legislature authorizing a sale of their lands in that state.

In 1804 the legislature passed an act repealing that section of the Act of 1801 which exempted the lands therein mentioned from taxes. The lands were accordingly assessed and the taxes demanded. The question before this Court was whether the Act of 1804 violated the constitutional provision against the impairment of the obligation of contracts.

Chief Justice Marshall quoted *Fletcher vs. Peck*, to show that the constitutional provision extended to contracts to which a State is a party as well as contracts between individuals, and said (page 167):

> "Every requisite to the formation of a contract is found * * * * . The privilege, though for the benefit of the Indians, is annexed, by the

terms which create it, to the land itself, not to their persons. It is for their advantage, that it should be annexed to the land, because, in the event of a sale, on which alone the question could become material, the value would be enhanced by it."

"* * * * This contract is certainly impaired by a law which would annul this essential part of it."

In later cases, counsel again contended before the Court that this case applied only to contracts concerning lands and that in that respect it was consistent with *Fletcher vs. Peck*, but that it did not apply to a bare contract to exempt a person or corporation from taxation. The answer to this contention was given in

State Bank of Ohio vs. Knoop, 16 Howard, 369 (1853).

There an Act of the Ohio Legislature provided that banking companies organized under it or accepting its terms and complying with its provisions should pay a certain ascertained tax which should be "in lieu of all taxes to which the company, or the stockholders therein, would otherwise be subject." (Page 377.) Later an Act was passed providing for the taxation of banks and bank and other stocks "the same as property is now taxable by the laws of the State." In pursuance of the latter Act, a tax was assessed against the defendant bank and suit

brought by the State authorities against the bank for the tax. The bank set up the defence that the tax was in violation of its charter which fixed the rate of taxation as above set forth. The Supreme Court of the State sustained the later Act and an appeal was taken to this Court. Counsel for the State of Ohio argued (page 375):

> "The taxing power is of such vital importance, and is so essentially necessary to the very existence of a State government, that its relinquishment cannot be made the subject-matter of a binding contract between the legislature and individuals or corporations. It is a prerogative of sovereignty that must of necessity always be exerted according to present exigencies, and consequently must of necessity continue to be held by each succeeding legislature, undiminished and unimpaired."

This Court held however (page 378), that the contract was so explicit that it was susceptible of but one construction, that nothing was left to inference and that it must, therefore, be enforced. The Court by Mr. Justice McLean, at page 382, examined the question whether the contractual language of the Act of Assembly could be regarded as a mere law prescribing a rule of taxation until changed, and not a contract stipulating against any change; a legislative command as distinguished from a legislative compact and decided (page 383) that this was a legislative contract.

The Court uses this language (page 384):

"The assumption that a State, in exempting certain property from taxation, relinquishes a part of its sovereign power, is unfounded. The taxing power may select its objects of taxation; and this is generally regulated by the amount necessary to answer the purposes of the State. **Now, the exemption of property from taxation is a question of policy and not of power.** A sound currency should be a desirable object to every government; and this in our country is secured generally through the instrumentality of a well-regulated system of banking. To establish such institutions as shall meet the public wants and secure the public confidence, inducements must be held out to capitalists to invest their funds. They must know the rate of interest to be charged by the bank, the time the charter shall run, the liabilities of the company, the rate of taxation, and other privileges necessary to a successfull banking operation.

"These privileges are proffered by the State, accepted by the stockholders, and in consideration funds are invested in the bank. Here is a contract by the State and the bank, a contract founded upon considerations of policy required by the general interests of the community."

The Court further says (pages 388 and 389):

"Neither this, the Rhode Island Bank case, nor the Charles River Bridge case, affords any aid to the doctrines maintained, with the single exception, that a right set up under a grant must clearly appear, and cannot be presumed; and this has not been controverted."

"That a state has power to make a contract which shall bind it in future, is so universally held by the courts of the United States and of the States, that a general citation of authorities is unnecessary on the subject. * * * * "

* * * * * * * *

"There is no constitutional objection to the exercise of the power to make a binding contract by a State. It necessarily exists in its sovereignty, and it has been so held by all the courts in this country. **A denial of this is a denial of State sovereignty.** It takes from the State a power essential to the discharge of its functions as sovereign. If it do not possess this attribute, it could not communicate it to others. There is no power possessed by it more essential than this. Through the instrumentality of contracts, the machinery of the government is carried on. Money is borrowed, and obligations given for payment. Contracts are made with individuals, who give bonds to the State. So in the granting of charters. If there be any force in the argument, it applies to contracts made with individuals, the same as

with corporations. **But it is said the State cannot barter away any part of its sovereignty. No one ever contended that it could.**

"**A State, in granting privileges to a bank, with a view of affording a sound currency, or of advancing any policy connected with the public interest, exercises its sovereignty, and for a public purpose, of which it is the exclusive judge.** Under such circumstances, a contract made for a specific tax, as in the case before us, is binding. This tax continues, although all other banks should be exempted from taxation. Having the power to make the contract, and rights becoming vested under it, it can no more be disregarded nor set aside by a subsequent legislature, than a grant for land. **This act, so far from parting with any portion of the sovereignty, is an exercise of it.** Can any one deny this power to the legislature? Has it not a right to select the objects of taxation and determine the amount? To deny either of these, is to take away State sovereignty.

"**It must be admitted that the State has the sovereign power to do this, and it would have the sovereign power to impair or annul a contract so made, had not the Constitution of the United States inhibited the exercise of such a power.** The vague and undefined notion, that every exemption from taxation or a specific tax, which withdraws certain objects from the

general tax law, affects the sovereignty of the State, is indefensible."

* * * * * * * *

"The argument is, and must be, that a sovereign State may make a binding contract with one of its citizens, and, in the exercise of its sovereignty, repudiate it."

It is true that in this case the Court said at page 391:

"The power of taxation has been compared to that of eminent domain, and it is said, as regards the question before us, they are substantially the same. These powers exist in the same sovereignty, but their exercise involves different principles. Property may be appropriated for public purposes, but it must be paid for. Taxes are assessed on property for the support of the government under a legislative act."

It is to be observed, however, that nothing is here said which in any way militates against a contract respecting the exercise of the power of eminent domain.

It is interesting to note that Mr. Justice Catron, Mr. Justice Daniel and Mr. Justice Campbell dissented in this case on the ground that the legislature had no right to release a "sovereign power," that the people had not delegated to their legislature any such authority to deal with the sov-

ereignty of the State as was here attempted. (See page 395.)

In

Ohio Life Insurance and Trust Co. vs. Debolt, 16 Howard, 416 (1853).

Mr. Chief Justice Taney expressed the reasons for his concurrence in the decision of the *State Bank vs. Knoop*. After stating the contention of counsel that the right of taxation cannot be aliened by mere statute so as to prevent its resumption whenever public necessities require, the Chief Justice states (page 428) that it must be admitted that with the exception of the powers surrendered by the Constitution of the United States, the people of the several States are absolutely and unconditionally sovereign within their respective territories. From this he argues that they may impose what taxes they think proper, may apportion them as they see fit and may exempt certain descriptions of property from taxation and lay the burden of government elsewhere. He adds that they may do this in the ordinary form of legislation or by contract and that nothing in the Constitution of the United States forbids either method. He admits that contracts are sometimes incautiously made by States as by individuals but says that whether such contracts should be made or not is exclusively for the consideration of the state. **He unequivocally states that the making of such a contract is "the exercise of an undoubted power of sovereignty which has not been**

surrendered by the adoption of the Constitution of the United States and over which this Court has no control.'' (Pages 428-429.)

He lays down (page 429) the principle that the people may confer on their representatives all powers and rights of sovereignty which they possess or may restrict them as they see fit; that if the contract is within the scope of the authority conferred, it is like any other contract made by competent authority, binding upon the parties. He says, ''Nor can the people or their representatives, by any act of theirs afterwards, impair its obligation. When the contract is made, the Constitution of the United States acts upon it, and declares that it shall not be impaired and makes it the duty of this court to carry it into execution. That duty must be performed.''

After adverting to the fact that this Court cannot be bound by the decision of a state court on the question whether the legislature had the power to make the contract (pages 432-433) he holds that the Act under discussion did not constitute a contract to exempt the company from taxation. In this conclusion, a majority of the Court concurred. It is to be observed, however, that the decision went solely upon the question of the construction of the act of legislature of Ohio and that the power to make a contract exempting from taxation was not doubted.

The doctrine of the above cases has been followed and reaffirmed in

Dodge vs. Woolsey, 18 Howard, 331 (1855); Jef-

ferson Branch Bank vs. Skelly, 66 U. S. 436 (1861); Wright vs. Sill, 67 U. S. 544 (1862); McGee vs. Mathis, 71 U. S. 143 (1866); Home of the Friendless vs. Rouse, 75 U. S. 430 (1869).

It has been reaffirmed in very recent cases, as, for example, **Rochester Ry. Co. vs. Rochester, 205 U. S. 236 (1906) at p. 247; Morris Canal and Banking Company vs. Baird, 239 U. S. 126 (1915).**

In **Home of the Friendless vs. Rouse,** (*supra*), Mr. Justice Miller was in dissent. With him concurred Chief Justice Chase and Mr. Justice Field.

In **Washington University vs. Rouse**, reported 75 U. S. 439, the grounds of this dissent were set forth. Mr. Justice Miller, at page 441, said: "And it is also settled beyond controversy that the State Legislatures may, by the enactment of statutes, make contracts which they cannot impair by any subsequent statutes." He subsequently says (page 443):

> "We do not believe that any legislative body, sitting under a State constitution of the usual character, has a right to sell, to give, or to bargain away forever the taxing power of the State. This is a power which, in modern political societies, is absolutely necessary to the continued existence of every such society. While under such forms of government, the ancient chiefs or heads of the government might carry it on by revenues owned by them personally, and by the exaction of personal service from their subjects, no civilized government

has ever existed that did not depend upon taxation in some form for the continuance of that existence. To hold, then, that any one of the annual legislatures can, by contract, deprive the State forever of the power of taxation, is to hold that they can destroy the government which they are appointed to serve, and that their action in that regard is strictly lawful."

"**It cannot be maintained, that this power to bargain away, for an unlimited time, the right of taxation, if it exist at all, is limited, in reference to the subjects of taxation. In all the discussion of this question, in this court and elsewhere, no such limitation has been claimed. If the legislature can exempt in perpetuity, one piece of land, it can exempt all land. If it can exempt all land, it can exempt all other property. It can, as well, exempt persons as corporations.** * * * * "

In

New Jersey vs. Yard, 95 U. S. 104 (1877)

although he had dissented in the earlier cases, he wrote the opinion of the Court to the effect that the statute there under consideration exempting a corporation from taxation amounted to a contract and very clearly stated the situation as follows (page 113):

"The principal function of a legislative body is not to make contracts, but to make laws. These laws are put into a form which, in all

countries using the English language and inheriting the English common law, is called a statute.

"Unless forbidden by some exceptional constitutional provision, the same authority which can make a law can repeal it. The Constitution of the United States has imposed such a limitation upon the legislative power of all the States, by declaring that no State shall pass any law impairing the obligation of a contract. The frequency with which this court has been called on to declare State laws void, because they do impair the obligation of contracts, shows how very important and far-reaching that provision is."

And again (page 114):

"* * * * question has been as to the existence and nature of the contract, and not the construction of the law which is supposed to impair it; and the greatest trouble we have had on this point has been in regard to what may be called legislative contracts,—contracts found in statute laws of the State, if they existed at all. It has become the established law of this court that a legislative enactment, in the ordinary form of a statute, may contain provisions which, when accepted as the basis of action by individuals or corporations, become contracts between them and the State within the protection of the clause referred to of the Federal Constitution.

"The difficulty in this class of cases has always been to distinguish what is intended by the legislature to be an exercise of its ordinary legislative function in making laws, which, like other laws, are subject to its full control by future amendments and repeals, from what is intended to become a contract between the State and other parties when the terms of the statute have been accepted and acted upon by those parties. This has always been a very nice point; and, when the supposed contract exists only in the form of a general statute, doubts still recur, after all our decisions on that class of questions."

He concluded as follows (page 114):

"The writer of this opinion has always believed, and believes now, that one legislature of a State has no power to bargain away the right of any succeeding legislature to levy taxes in as full a manner as the Constitution will permit. But, so long as the majority of this court adhere to the contrary doctrine, he must, when the question arises, join with the other judges in considering whether such a contract has been made."

(c) **Contracts in respect of the Eminent Domain.**

We respectfully submit that this Court has definitely settled, in the affirmative, the authority of a state to surrender or to restrict the right of eminent domain. Some of the very cases cited by text writers as proving the contrary of this proposition, in fact led up to the final decision of the question and are of the greatest value in showing how the doctrine was evolved.

We shall cite these cases in the order of their decision and comment upon them as we proceed.

The first great land-mark in this line is

Charles River Bridge vs. Warren Bridge, 11 Peters, 420 (1837).

A careful analysis of the facts is necessary to a proper understanding of the scope of the decision. An ancient ferry right existed across the Charles River and was owned by Harvard College. By an Act of Assembly a corporation was created and given the right to erect and maintain a toll bridge paying certain compensation to the college for the destruction of the ferry. Later an act was passed extending the charter of the company and by this same act another bridge company (The Warren Bridge) was incorporated with the right to build a bridge near the Charles River Bridge, which in a few years should become a free bridge. This meant the virtual destruction of all value represented by the Charles River Bridge.

The Charles River Bridge attacked the validity of the second act so far as it attempted to create the new bridge company, contending that the earlier act was a contract that it should have an exclusive franchise and that the later act was an attempted impairment of that contract.

Now, it is quite evident that the authorizing of another bridge across the Charles River was a matter within the governmental power of the commonwealth of Massachusetts. If then this Court had found that the first Act was a contract, the question of the power of the State to make it, and if it were lawfully made, the right to impair it, would have fairly arisen. That is to say, the authority of the legislature to surrender this power by contract would have been in issue.

Eminent counsel contended that this was the issue.

Greenleaf, for defendants, argued that the power of eminent domain, like that of taxation, is an essential attribute of sovereignty, and that the right to bargain them away was never delegated to the Legislature. (P. 466.)

Webster, for the plaintiffs, replied at length concerning the right. (Pages 515, 533, 534, 535.)

It remained for Davis, of counsel for defendant, to point out that plaintiffs' first duty was to establish that it had a contract and that until it had done so all discussions of the power of the assembly either to make or impair it were beside the point.

It was this very ground which this Court took in deciding the case. Chief Justice Taney, on page

538, says that the plaintiffs must place themselves on the ground of contract. He sums up the situation on page 540 as follows:

> "**** In other words, they must show, that the state had entered into a contract with them, or those under whom they claim, not to establish a free bridge at the place where the Warren bridge is erected. Such, and such only, are the principles upon which the plaintiffs in error can claim relief in this case."

He holds (and the doctrine has been ever since followed in this Court) that every presumption is in favor of the state and that the burden lies on him who alleges the state has made a contract with him to clearly demonstrate it from the words of the act. Clear expression, not implication, is required. (Pages 545-546.)

He places the decision squarely on the ground that no contract was in fact made with the plaintiff by the state, in the following words:

> "The inquiry, then, is does the charter contain such a contract on the part of the state? Is there any such stipulation to be found in that instrument? It must be admitted on all hands, that there is none; no words that even relate to another bridge, or to the diminution of their tolls, or to the line of travel. If a contract on that subject can be gathered from the charter, it must be by implication; and cannot be found in the words used. Can such an agreement be

> implied? The rule of construction before stated is an answer to the question: In charters of this description, no rights are taken from the public, or given to the corporation, beyond those which the words of the charter, by their natural and proper construction, purport to convey. There are no words which import such a contract as the plaintiffs in error contend for, and none can be implied; * * * * " (p. 549).

Here then is merely a decision that if any of the great powers of sovereignty are to be granted away, whether that of taxation or that of the eminent domain, (see bottom of page 547 where both are spoken of in the same connection) a clear contract must be made. This is all that it was necessary to decide, and plainly it was all that the Court did decide.

It is somewhat hard then to understand how text writers can quote this case as deciding that the power of eminent domain cannot be surrendered by legislative contract. But of this more hereafter.

The next authority, which, again, is often cited for the same proposition is

West River Bridge Co. vs. Dix, 6 Howard, 507 (1848).

Here too, the facts must be narrowly examined.

By an act of the legislature of Vermont the plaintiff corporation was formed and in said act it was provided that plaintiff should have the exclusive

privilege of erecting and continuing a bridge over West River, within four miles from the place where said stream united with Connecticut River. Another section of the act fixed the rate of tolls.

Years after the bridge was built, the legislature passed a general road law, providing in quite the usual way, that when new highways were needed a petition might be filed in the proper court and that by proper proceedings such highways should be laid out and compensation paid for the taking of any property or franchise which might be so taken for highway purposes.

A petition was filed under this act for a road which should, *inter alia*, pass over the West River on the bridge of plaintiff. A decree was made opening said road and due compensation secured to plaintiff for the taking of its **bridge and franchise.** The plaintiff filed a bill to restrain the taking on the ground that it would impair the obligation of the contract made with plaintiff in the earlier act. The bill was dismissed.

This Court affirmed the action of the Supreme Court of Vermont which had held that the taking did not violate the Constitution of the United States.

Webster for plaintiff argued that the impairment of the obligation of plaintiff's contract was thinly veiled under a *pretended* exercise of the power of eminent domain, and contended that eminent domain applied only to realty, and that a franchise could not be taken by virtue of it. (p. 516.)

Phelps, for defendant, claimed that the power was inalienable by "ordinary legislation" (522) but that in any event a private right conferred by the state was as much subject to be taken as any other private property (526) and that the devotion of property under state law to one public use did not prevent its being subjected to another public use.

Mr. Justice Daniel, speaking for the Court, said that it could not be doubted that plaintiff's charter was a contract, and that it could not be impaired, under Article I, Section 10, of the constitution. (531)

He said:

> "No state, it is declared, shall pass a law impairing the obligation of contracts; yet with this concession constantly yielded, it cannot be justly disputed, that in every political sovereign community there inheres necessarily the right and the duty of guarding its own existence, and of protecting and promoting the interests and welfare of the community at large. This power and this duty are to be exerted not only in the highest acts of sovereignty, and in the external relations of governments; they reach and comprehend likewise the interior polity and relations of social life, which should be regulated with reference to the advantage of the whole society. This power, denominated the eminent domain of the state, is, as its name imports, paramount, to all private rights vested

under the government, and these last are, **by necessary implication,** held in subordination to this power, and must yield in every instance to its proper exercise.
(Boldface ours.)

He proceeds: (page 532)

"**But into all contracts, whether made between states and individuals or between individuals only, there enter conditions which arise not out of the literal terms of the contract itself; they are superinduced by the pre-existing and higher authority of the laws of nature, of nations, or of the community to which the parties belong; they are always presumed, and must be presumed, to be known and recognized by all, are binding upon all, and need never, therefore, be carried into express stipulation for this could add nothing to their force. Every contract is made in subordination to them, and must yield to their control, as conditions, inherent and paramount, wherever a necessity for their execution shall occur.** Such a condition is the right of eminent domain. This right does not operate to impair the contract affected by it, but recognizes its obligation in the fullest extent, claiming only the fulfilment of an essential and inseparable condition. Thus, in claiming the resumption or qualification of an investiture, it insists merely on the true nature and character of the right invested. The im-

pairing of contracts inhibited by the Constitution can scarcely, by the greatest violence of construction, be made applicable to the enforcing of the terms or necessary import of a contract; **the language and meaning of the inhibition were designed to embrace proceedings attempting the interpolation of some new term or condition foreign to the original agreement, and therefore inconsistent with and violative thereof.** It, then, being clear that the power in question not being within the purview of the restriction imposed by the tenth section of the first article of the Constitution, it remains with the states to the full extent in which it inheres in every sovereign government, to be exercised by them in that degree that shall by them be deemed commensurate with public necessity. **So long as they shall steer clear of the single predicament denounced by the Constitution, shall avoid interference with the obligation of contracts the wisdom, the modes, the policy, the hardship of any exertion of this power are subjects not within the proper cognizance of this court.** * * * In our country, it is believed that the power was never, or, at any rate, rarely, questioned, until the opinion seems to have obtained that the right of property in a chartered corporation was more sacred and intangible than the same right could possibly be in the person of the citizen; an opinion which must be without any grounds to rest upon, until it can

be demonstrated either that the ideal creature is more than a person, or the corporeal being is less. For, as a question of the power to appropriate to public uses, the property of private persons, resting upon the ordinary foundations of private right, there would seem to be room neither for doubt nor difficulty."
(Boldface ours.)

On page 534 he says:

"We are aware of nothing peculiar to a franchise which can class it higher, or render it more sacred, than other property. A franchise is property, and nothing more; it is incorporeal property, and is so defined by Justice Blackstone, when treating, in his second volume, chap. 3, page 20, of the Rights of Things. * * * **A franchise, therefore, to erect a bridge, to construct a road, to keep a ferry and to collect tolls upon them, granted by the authority of the state, we regard as occupying the same position, with respect to the paramount power and duty of the state to promote and protect the public good, as does the right of the citizen to the possession and enjoyment of his land under his patent or contract with the state, and it can no more interpose any obstruction in the way of their just exertion.** Such exertion we hold to be not within the inhibition of the Constitution, and no violation of a contract." (Boldface ours.)

We have italicised certain of the language above quoted. Our purpose in so doing was to call attention to the fact, that essentially there is in this decision, no difference from what was expressed in the *Charles River Bridge case* (*supra*).

The only advance over what was there decided is the statement that property held under a franchise from the state is as much subject to the power of eminent domain as is purely private property. **Here was no case of a contract by the state not to exercise the power.** How can there be the slightest doubt that it must be implied that the property held under the franchise is subject to this great and necessary power?

Mr. Justice McLean, who concurred, went upon the same ground, as is evidenced by the illustration used (at page 537) after stating that the state cannot modify or repeal a corporate charter, unless the power so to do is reserved, he says: "But no one doubts the power of the state to take a banking house for public use."

Mr. Justice Woodbury, who also concurred, said: (at page 539)

> "I take the liberty to say, then, as to the cardinal principle involved in this case, that, in my opinion, all the property in a state is derived from, or protected by, its government, and hence is held subject to its wants **in taxation, and to certain important public uses, both in war and peace.**

He proceeds to say that the plaintiff cannot prevail (p. 542):

> **"Because there was no covenant or condition in the charter or contract, that the property owned by it should not be liable to be taken, like all other property in the state, for public uses in highways.**
>
> **"Because without such covenant, all their property, as property, must be liable to proper public uses, either by necessity, or the sovereignty of the state over it, or by implied agreement.**
>
> **"And because, on a like principle, taxes may be imposed on such property, as well as all other property though coming by grant from the state, and may be done without violating the obligation of the contract, when there is no bonus paid or stipulation made in the charter not to tax it. This is well settled."**

Is it not quite clear that this language is equally applicable to the decision in the tax exemption cases and foreshadows likewise a decision against the impairment of the obligation of a contract not to exercise the power to take private property for public use provided only a "covenant" to that effect has been made?

The matter came one degree nearer a flat decision in

> **Bridge Proprietors vs. Hoboken Co., 1 Wall. 116 (1863).**

In this case New Jersey in 1790, by a special act, created a turnpike company and authorized the commissioners to fix bridge sites over certain rivers and to cause to be erected a bridge over each river with the right to take toll. The commissioners were given a right to contract with persons who would undertake to build the bridges on such conditions as the commissioners should think expedient. The Act provided:

> "That the said contract should be valid and binding on the parties contracting as well as on the State of New Jersey * * * as if the same * * * had been particularly * * * * and expressly set forth and enacted in this law."

The Act further provided:

> "That it shall not be lawful for any person or persons whatsoever to erect, or cause to be erected (within certain limits) any other bridge or bridges over or across the said river."

The bridges were built in accordance with the Act.

In 1860 a Statute authorized a company to build certain "viaducts" over the rivers in question and gave the company the right of eminent domain. A bill was filed by the first company to restrain the building of the viaducts. The bill was dismissed by the Courts of New Jersey. An appeal was taken to this Court and the judgment was affirmed. Mr. Justice Miller held there was a contract which could not be violated. He said (pp. 145-146):

"Approaching the merits of the case, the first question that presents itself for solution, is whether the act of 1790, and the agreement made under it by the commissioners with the bridge builders, constitute a contract that no bridge shall be built within the designated limits, but the two which that statute authorized. **This we think to be so very clear as not to need argument or illustration.** The parties who built the bridges had the positive enactment of the legislature, in the very statute which authorized the contract with them, that no other bridge should be built. They had a grant of tolls on their bridges for ninety-nine years, and the prohibition against the erection of other bridges was the necessary and only means of securing to them the monopoly of those tolls. Without this, they would not have invested their money in building the bridges, which were then much needed, and which could not have been built without some such security for a permanent and sufficient return for the capital so expended. **On the faith of this enactment they invested the money necessary to erect the bridges. These acts and promises, on the one side and the other, are wanting in no element necessary to constitute a contract. Such legislative provisions of the States have so often been held to be contracts, that a reference to authorities is superfluous.**" (Boldface ours.)

He went on to say, however, that the contract in question only covered bridges as they were understood to be at the time of the Act of 1790. At that time there were no such things as railroad viaducts. He, therefore, construed the contract not to forbid the building of a railroad viaduct, because that was really not a "bridge" in the sense that plaintiff's structures were "bridges," in no wise competed with them or impaired their franchises, and hence was not within the inhibition of the contractual Act of Assembly.

Here we have an unanimous statement by this Court that the state's power of eminent domain can **be restrained and surrendered** by contract.

But the case which actually so decided is

The Binghamton Bridge, 3 Wall. 51 (1865).

The New York Legislature, in 1805, by an act, established a turnpike corporation known as the "Susquehanna Bridge Company" (afterwards changed to "Chenango Bridge Company") and gave it the same rights and powers, privileges, immunities and advantages as had been given to another corporation created by the same act and known as the "Delaware Bridge Company." A section of the act creating the Delaware Bridge Company provided:

> **"It shall not be lawful for any person or persons to erect any bridge, or establish any ferry across the said west and east branches of Dela-**

ware River within two miles either above or below the bridges to be erected and maintained in pursuance of this act."

In 1855 the Legislature granted a charter to the Binghamton Bridge Company to build a bridge a few rods above the one which had been built by the Susquehanna Bridge Company. The old company filed a bill to enjoin the new one. The bill was dismissed and the Court of Appeals of New York affirmed such dismissal. An appeal was taken to this Court.

Mr. Dickinson, for appellant, argued as follows (59):

> "We concede that the legislature may, by a clear manifestation of its intention to do so, make dispositions of matters which are proper subjects of its disposition. It may sell all which is the subject of bargain. But its sovereignty cannot be vended *in perpetuo*. One legislature cannot place the sovereignty of the state or any portion of it beyond the reach of all succeeding ones.
>
> "A disposition of that in which the supremacy of government rests, is an assumption of power not legislative in its nature and is void. The legislature here has disposed of the right of passing a great river for four miles. If it can dispose of it for four miles, it can do so for a hundred, and when the principle is admitted, what is to curb it but the slender rein of legislative discretion? The Chenango, from its source

to its mouth, is nearly a hundred miles in length. If the legislature had extended the restriction over the whole, the question in all its legal relations would have been the same. This shows to what point the doctrine leads. A state is the guardian, not the broker of its people's rights; the protector, not the auctioneer, of their property. It is invested with great and awful powers, and must necessarily be so; but among them all there is no power to oppress." (The Reporter's note reads: "See this matter strongly put by counsel, *arguendo*, in *Bridge Proprietors vs. Hoboken Co.*, 1 *Wallace*, 131—Rep.")

The Court, by Mr. Justice Davis, held that the prohibition enacted with regard to the Delaware Bridge Company applied to the Susquehanna Bridge Company. The decree of the Court of Appeals was reversed. It was held that the case was within the principle of the Dartmouth College case; that there was a consideration for the contract, namely, the embarkation in the enterprise by the incorporators of the bridge, that while the rule of construction is favorable to the state in the interpretation of legislative contracts this does not mean that where rights are clearly defined by the contract they may be taken away from the grantee. He said (p. 81):

"Has the legislature of 1855 broken the contract, which the legislatures of 1805 and 1808 made with the plaintiffs?

"The foregoing discussion affords an easy an-

swer to this question. The legislature has the power to license ferries and bridges, and so to regulate them, that no rival ferries or bridges can be established within certain fixed distances. No individual without a license can build a bridge or establish a ferry for general travel, for 'it is a well-settled principle of common law that no man may set up a ferry for all passengers, without prescription time out of mind, or a charter from the king. He may make a ferry for his own use, or the use of his family, but not for the common use of all the king's subjects passing that way, because it doth in consequence tend to a common charge, and is become a thing of public interest and use; and every ferry ought to be under a public regulation.' As there was no necessity of laying a restraint on unauthorized persons it is clear that such a restraint was not within the meaning of the legislature. The restraint was on the legislature itself. The plain reading of the provision, 'that it shall not be lawful for any person or persons to erect a bridge within a distance of two miles,' is, that the legislature *will not make it lawful* by licensing any person, or association of persons, to do it. And the obligation includes a free bridge as well as a toll bridge, for the security would be worthless to the corporation if the right by implication was reserved, to authorize the erection of a bridge which should be free to the public. **The Binghamton Bridge**

> **Company was chartered to construct a bridge for general road travel, like the Chenango bridge, and near to it, and within the prohibited distance. This was a plain violation of the contract which the legislature made with the Chenango Bridge Company, and as such a contract is within the protection of the Constitution of the United States, it follows that the charter of the Binghamton Bridge Company is null and void."** (Boldface ours.)

There was a dissent by the Chief Justice and Justices Field and Grier. The dissent went upon the ground that the provisions with regard to the Delaware Bridge ought not to be imported into the other paragraphs creating the Susquehanna Bridge and that granting the power of the legislature to bind future legislatures by contracts there was here no such clear contract as ought to be enforced by the courts.

Now, we ask, if the power of control over the means of public transportation across the rivers of the state, those great natural barriers to free passage over the land, is not a governmental power, what is it? Is not a contract not to destroy the exclusiveness of a franchise, a contract not to exercise the power of eminent domain in such manner as to take away that exclusive feature of the franchise which is surely a property right? Here counsel argued by threatening death to the state, by dragging forth the same old bugbears which had failed so often to stampede

this Court in the tax exemption cases. But the effort failed here as it had failed in the tax cases.

The arguments against the contract are the same in both classes of cases, the supposed evils are the same. But this Court has in both cases upheld the constitution and in both cases held the state's contract inviolable.

The foregoing cases have a vital bearing upon the question at issue in another aspect of it. *West River Bridge Company vs. Dix* shows that a contract for an exclusive right is not violated by the taking of the company's entire property and franchises. The *Binghamton Bridge case* shows that the contract is violated by the attempt to take merely the exclusiveness and leave the corporation with its property and franchise denuded of the value which the exclusive character given it by the contract adds to it. None of these cases, it is to be remarked, are cases where the state agreed not to take the property of the corporation as a whole. Nor is the case at bar one where the state has agreed not to take the plaintiff's property. In the present case, as in the above cases, the restriction upon the exercise of the state's governmental power was narrow and referred only to a matter collateral to the property owned by the corporation. The cases cited clearly show that while there is no restriction on what we may call the larger or major eminent domain, there is a valid and binding contract not to exercise the smaller or minor eminent domain. There is no contract to abdicate the sovereign power, but merely an agreement that, if

exercised, it will not be exercised on a given property in a certain way. In the case at bar we find the same thing. There is no broad covenant not to exercise the power. There is merely a covenant that it shall not be exercised in a certain limited way which would be detrimental to the corporation.

(d) Contracts respecting exclusive franchises and rates.

Approaching closely in principle the foregoing cases concerning the means of public travel and communication are the cases in this Court in which states have been prevented from impairing the obligation of contracts entered into concerning franchises and rates. Perhaps the leading cases on the subject are **New Orleans Gas Company vs. Louisiana Light Company**, 115 U. S. 650 (1885) and **New Orleans Water Works Company vs. Rivers**, 115 U. S. 674 (1885). In both of these cases a legislative grant of an exclusive right to supply a commodity, in the one case gas and in the other water, to a municipality, was held, upon its acceptance by the contracting party and after action taken under it by him, to constitute a contract whose obligation could not be impaired. In each case the state attempted by the adoption of a subsequent constitution and action of the legislature in accordance with the new constitution to grant to other parties a right inconsistent with the exclusive right originally granted. In both cases injunctions were asked and refused by the state courts. This Court reversed.

The cases contain a most interesting discussion of the limits of the police power and the applicability of the police power to the questions presented. It was unequivocally held that the contracts were within the governmental power of the legislature, that

they were reasonable and made for a proper purpose and that they could not be abrogated under any pretence that the police power required such abrogation. It was pointed out that the property of the companies was necessarily subject to proper regulation as to its use in the interest of the health and safety of the community but that such regulation could not be strained for the purpose of destroying the exclusiveness of the franchise.

These cases have a particular interest for us in the present case because (116 U. S. p. 673) Mr. Justice Harlan points out that there is nothing in the contract between the state and the company which will prevent the state from taking the property and franchises of the company as a whole for public use. In other words, these cases are authority for the proposition which we argue more fully elsewhere, that whereas the state cannot take the exclusiveness of the franchise away, either under the guise of the police power or under the guise of the eminent domain power, yet since the state has not contracted against the taking of the company's property for public use and since the larger includes the less, the state is at liberty to take for public use the entire property of the company and make compensation therefor. The result of such taking, of course, will be to leave the state or the city at liberty to do what it pleases concerning other franchises. The cases fully sustained the proposition that the contract as such cannot be taken, leaving the property in the hands of the company without the protection

of the contract. In strict analogy to these cases we maintain that while it is competent to the state in the present case to take the property—that is, all of the property of the hospital, for public use, thus relieving the property of any contractual restrictions with regard to its use, it is not competent to the state to take away the plaintiff's contract rights, thus leaving it with its property bare of the contractual restriction. It hardly seems conceivable that this Court would have held in the above cases that the State of Louisiana might take by condemnation in eminent domain the exclusiveness of the franchise leaving the company with its franchise and its property, but depriving it of its contractual rights.

The doctrine of the two cases above cited has been repeatedly approved and reaffirmed. In

Walla Walla City vs. Walla Walla Water Company, 172 U. S. 1 (1898), a contract with a water company for the supply of a city with water, which limited the right of the city to erect water works during the life of the contract was held to be inviolable. In

Los Angeles vs. Los Angeles City Water Company, 177 U. S. 558 (1899), a contract by a city, under authority granted it by the state to make such a contract, which forbade the city to reduce the rates to be charged by the water company below a certain minimum was protected by this Court from impairment.

In Freeport Water Company vs. Freeport City, 180 U. S. 587 (1900), it was held by a majority of

this Court that there was no contract, but Mr. Justice McKenna, who delivered the opinion of the majority, said, citing the cases above mentioned:

> "It is not clear from the opinion of the court whether it intended to decide that municipal corporations could not be invested with the power to bind themselves by an irrevocable contract not to regulate water rates. If so, we cannot concur in that view. We have decided to the contrary many times. * * * *" (Page 593.)

And the present Chief Justice, writing the dissenting opinion to the effect that there was a contract, said:

> "Numerous other cases could be cited as establishing the doctrine that the state may by contract restrict the exercise of some of its most important powers." (Page 608.)

He gives on pages 607, 608 and 609 a resumé of the cases above cited and refers to others in support of the doctrine.

The late cases which reaffirm the principle are **Russell vs. Sebastian, 233 U. S. 195 (1903)** and **New York Electric Lines Company vs. Empire City Subway Company, 235 U. S. 179 (1914).**

IV. SUCH CONTRACTS ARE STRICTLY CONSTRUED; UNLESS IT BE FOUND THAT THERE IS IN FACT A CONTRACT, NO RIGHTS ACCRUE AGAINST THE STATE.

As early as

Providence Bank vs. Billings, 4 Peters, 514 (1830),

a case in which the bank claimed that a contract to exempt it from taxation had been made by the legislature and was threatened with abrogation by later legislation, it was laid down that such contracts could not arise by presumption or implication.

This case, in the field of taxation, is the exact analogue of *Charles River Bridge vs. Warren Bridge, (supra)*, and *West River Bridge vs. Dix, (supra)*, in the field of eminent domain. We can do no better than to quote what Chief Justice Marshall said (page 560):

> "It has been settled, that a contract entered into between a state and an individual, is as fully protected by the tenth section of the first article of the constitution, as a contract between two individuals; and it is not denied, that a charter incorporating a bank is a contract. Is this contract impaired by taxing the banks of the state?
>
> "This question is to be answered by the charter itself. It contains no stipulation promising exemption from taxation. The state, then, has made no express contract which has been impaired by the act of which the plaintiffs com-

plain. No words have been found in the charter, which, in themselves, would justify the opinion, that the power of taxation was in the view of either of the parties; and that an exemption of it was intended, though not expressed. * * *"

(Page 562):

"* * * We must look for the exemption in the language of the instrument; and if we do not find it there, it would be going very far, to insert it by construction."

In

Charles River Bridge vs. Warren Bridge, 11 Peters, 420 (1837), Chief Justice Taney said (p. 547):

"* * * A state ought never to be presumed to surrender this power, because, like the taxing power, the whole community have an interest in preserving it undiminished. And when a corporation alleges, that a state has surrendered, for seventy years, its power of improvement and public accommodation, in a great and important line of travel, along which a vast number of its citizens must daily pass, the community have a right to insist, in the language of this court, above quoted, 'that its abandonment ought not to be presumed, in a case, in which the deliberate purpose of the state to abandon it does not appear.' * * *"

But the contract in our case is so plain and unambiguous, so clear, that there is no need of presumption, implication or inference. It says what it means in the most unequivocal terms.

V. THE SWEEPING TEXT BOOK DOCTRINE IS NOT BORNE OUT BY THE CASES CITED IN SUPPORT OF IT.

Lewis, in his treatise on Eminent Domain, 3rd Edition, Section 406, p. 735, under a heading reading: "The Legislature cannot surrender or preclude itself from the exercise of the Eminent Domain Power," says:

> "If this were not so it would be possible for one legislature to block and render forever impossible the most needed and valuable public improvements. A legislature could grant a right of way across the State and make a binding stipulation that it should never be crossed by any other line of transportation or communication. And if the eminent domain power could thus be bargained away, so could the police power and power of taxation. The State might thus soon cease to be sovereign, and corporations and franchise-holders become the dominant power. The result of this process of reasoning is that the sovereign powers of the State cannot be bargained away, restrained, surrendered or extinguished by the action of the legislature. If there is any exception to this rule it applies to the power of taxation only, which may be surrendered or commuted, as to particular persons or property, for a valuable consideration received by the State. But even this

exception has not been established without emphatic protest. Judge Cooley sums up his discussion of this subject as follows: 'It would seem, therefore, to be the prevailing opinion, and one based upon sound reason, that the State cannot barter away, or in any manner abridge or weaken, any of those essential powers which are inherent in all governments, and the existence of which in full vigor is important to the well-being of organized society; and that any contracts to that end are void upon general principles, and cannot be saved from invalidity by the provision of the national constitution now under consideration. If the tax cases are to be regarded as an exception to this statement, the exception is perhaps to be considered a nominal rather than a real one, since taxation is for the purpose of providing the State a revenue, and the State laws which have been enforced as laws in these cases have been supposed to be based upon a consideration by which the State receives the benefit which would have accrued from an exercise of the relinquished power in the ordinary mode.' The authorities are quite conclusive to the effect that the police power cannot be surrendered or restricted. And we believe that the authorities are equally emphatic with respect to the eminent domain power. An agreement or stipulation, either by the State or a municipal corporation, that the power of eminent domain shall not be exercised in a par-

> tieular manner or in respect to certain property, is null and void. The granting of an exclusive privilege or franchise is neither in form or substance an agreement that the power of eminent domain shall not be exercised to take or interfere with such franchise or privilege. The exclusive feature is inserted in order to induce private parties to invest their capital in an enterprise which might otherwise be rendered valueless without redress by the making of similar grants to others. The legislature thereby simply creates a valuable right or property, but this property remains subject to the eminent domain power, like any other property. A provision in a charter that the property of the company shall not be taken for certain public uses, is void as a contract, and amounts simply to the expression of a legislative intent that, for the time being, the power of eminent domain shall not be so exercised. The legislature having full power to grant or withhold the exercise of the right of eminent domain, it is competent for it to provide that streets shall not be laid through cemeteries or railroad grounds, but it is also competent to reverse this policy at any time."

The citation of authority for nearly all of this is "*Cooley's Constitutional Limitations.*" For the proposition that the power of eminent domain may not be surrendered the author cites eight cases, and his statement of the rule is only valuable so far as

his authorities support it. We shall, therefore, examine them. They are:

1. *Hyde Park Village vs. Oakwoods Cemetery Assn.*, 119 *Ill.* 141 (1886).

This case was greatly relied on by defendants in error in the court below.

It was a proceeding to condemn lands owned by the cemetery for a highway. The village was incorporated by an act of 1872. The cemetery association was incorporated in 1853 by a special act. By an act of 1867 the association was given power to make all improvements in the cemetery or streets adjoining the same. This act further provided: "No road, street, alley or thoroughfare shall be laid out or opened through said grounds, or any part thereof, without the consent of the directors, nor shall any corporation now existing or hereafter created, be authorized to take, hold or possess any portion of said cemetery, by condemnation without such consent."

The proceeding was under a later general act giving villages the right to open roads and streets within their boundaries. The trial court held that the act of 1867, forbade the taking of the association's lands and dismissed the petition. The decree was affirmed by the Supreme Court of Illinois. Justice Craig said (p. 147), that there were two questions to be considered: (1) has the section of the act of 1867 in question been repealed by the general law

authorizing villages to open roads, &c.; (2) has the legislature power to exempt the property of the association from the operation of the law of eminent domain, which has been conferred on the village?

He held (p. 148) that the Act of 1867 granting the exemption and the later general road law **should be construed together** and that so construed the legislature, by the general act, had given the village power to open streets anywhere within the village **except** as forbidden by the special Act of 1867.

It is true, he says further, that a legislative bargain surrendering the power of eminent domain is void (citing *Cooley Const. Lim.* and *West River Bridge Co. vs. Dix, supra*). But he repeats that the legislature has not in fact conferred on the village the superior right.

This supposed authority then, amounts to the *dictum* of one judge who misapplies a case decided by this Court. It is purely **obiter**, since the **ratio decidendi**, is the consonance of the two statutes as interpreted by the court. **The cemetery was, in fact, adjudged to have the exclusive right, and its lands to be free of the village's exercise of the power of eminent domain.**

But more. The act of 1867, it appears, was not a contract. It was a mere declaration of legislative policy. Its provisions were not part of the association's charter; no money was invested on the faith of them. (See *Binghamton Bridge ubi, supra.*) Above all the association gave not a whit of **consideration** for the proffered immunity. To say the

act was a contract is to say what is not so. The exemption was at best a mere license or immunity given as a pure favor. As such it was revocable at the pleasure of the legislature. (See *Christ Church vs. Philadelphia*, 65 *U. S.* 300, *infra*, p. 97.)

2. *Brimmer vs. Boston*, 102 *Mass.* 19 (1869).

Defendants in error also relied upon this case in the court below; and it appears to be often cited in support of their views.

Here the city and plaintiff's predecessor in title entered into a contract concerning a wharf then owned by the city. The contract provided, *inter alia*, that the city would never interfere with, or obstruct, a certain passageway leading to the wharf.

Under authority of a general statute of Massachusetts the Board of Aldermen of the City laid out a street which would obstruct the passageway. The plaintiff filed a bill to restrain the opening of the street, claiming that it would be a plain violation of the contract. The bill was dismissed, and the Supreme Court of Massachusetts affirmed this action.

This decision was placed squarely on the ground that the **municipal corporation, a mere creature of the state, could not bargain away the rights of the state.** This will appear from a quotation from the opinion of Morton, J.:

> "In laying out ways within the City of Boston, the Board of Aldermen have similar powers and

perform like duties as are exercised and performed by the County Commissioners in the other counties of the state. Gen. Stats. c. 43, sec. 77. In the exercise of these powers and performance of these duties, they act **not as officers or agents of the city, but as public officers, vested with quasi-judicial functions, and deriving their power from the sovereign authority.** The Board of Aldermen and Common Council, in laying out and constructing ways, are not subject to the direction or control of the inhabitants of the city, but are an independent board of public officers, vested by law with the control of all matters within their jurisdiction, and performing duties imposed by general laws.

> "**The laying out, establishing and constructing the way is the act of the State, in the exercise of the power of eminent domain. This sovereign power of appropriating private property for public uses cannot be destroyed or abridged by the acts of any individual or corporation.**"

The learned justice then says that plaintiffs held their estate subject to the same liability to be taken as all other owners and that the mere fact that they held it under a covenant of quiet enjoyment from a municipal corporation cannot create in their favor an exemption from the common burden.

We subscribe to every word of this doctrine. If a creature of the state, unauthorized and not empow-

ered thereto, could make contracts, abrogating the state's powers, what a topsy-turvy thing law and government would become. But why, in the name of reason, should so plain a proposition be confused with one which has to do with the State's own power to contract!

3. *First Street*, 66 *Mich.* 42 (1887).

This case was cited by defendants in error in the court below.

It was a petition by a city to condemn private property for opening First Street. Part of the property to be taken was owned by a railroad company which claimed to have a contract with the city, arising out of certain formal action taken by the city councils, to the effect that First Street was not to be opened across the railroad property. As we read the report the action of councils did not amount to a contract at all. The trial court, however, treated it as constituting a contract.

The Supreme Court of Michigan (p. 54) says it is doubtful if the action of the city council amounted to a contract. But assuming that it did, the Court holds that the council could not bind the legislative function of future councils. The constitutional question now before the Court was not raised at all. But it is plain it could not have been successfully maintained that a city council could, without antecedent authority to act as the State's agent in that behalf, bind the State not to exercise the power of eminent

domain. The case is quite analogous to *Brimmer vs. Boston*, (*supra*), but has no bearing on this case.

4. *Brewster vs. Hough*, 10 *N. H.* 138 (1839).

In this case, at page 143, Barker, C. J., said:

> "The power of taxation is essentially a power of sovereignty, or eminent domain, and it may well deserve consideration whether this power is not inherent in the people, under a republican government; and so far inalienable that no legislature can make a contract by which it shall be surrendered, without express authority for that purpose, in the constitution, or in some other way directly from the people themselves."

We need only remark that the matter referred to by the learned Chief Justice has had the consideration it deserved from this Court, with the result that the power so to contract has been sustained. The case deals only with taxation, classes it as part of the eminent domain, and is to that extent an authority in our favor.

5. *People vs. Adirondack Ry. Co.*, 160 *N. Y.* 225 (1899).

This is a case dealing with "due process." It does not even mention the question of a contract or its obligation. We shall not weary the Court with a statement of it. A glance will suffice to show that it in no wise supports Mr. Lewis' statement above quoted.

6. *In re Twenty-second Street*, 102 *Pa.* 108 (1883).

7. *Bridge Co. vs. Clinton County*, 157 *Pa.* 379 (1893).

8. *Commonwealth vs. Broad St. Ry. Co.*, 219 *Pa.* 11 (1907).

These three Pennsylvania cases are the last cited. We shall, however, defer our discussion of them until a later portion of this brief. (See *infra*, p. 92.)

The cases above discussed are apparently the best Lewis can offer in support of his doctrine.

Mills on Eminent Domain, Section 40, says, in sweeping language, that the right of eminent domain cannot be abridged by contract.

The authorities cited by Mills for his statement, are ten in number, but we submit that not one of them decided the proposition or even has any indirect bearing favorable to the view expressed in the text. They are as follows:

(1) *Backus vs. Lebanon*, 11 *N. H.* 19 (1840).

This case holds, as West River Bridge vs. Dix holds, that the franchises of a corporation are property and the charter is a contract; that to take the franchise under the power of eminent domain does not impair the charter contract.

(2) *Proprietors of Locks vs. Lowell*, 7 *Gray* (*Mass.*), 223 (1856).

This case merely illustrates the familiar principle

that property taken under the power of eminent domain, for a public use, may by subsequent legislation be again taken for a new public use.

(3) *State vs. Hudson Tunnel Co.*, 38 *N. J. L.* 548 (1876).

This was an appeal from an order appointing viewers in an eminent domain proceeding. As appears on page 558 of the report, objection was made to the legality of the proceedings because of a grant and lease of lands by the State to the respondent, in which the State covenanted with the respondent that the State would not make or give any grant or license, power or authority, affecting the lands lying under the waters in front of the lands so granted. The court held that the application before it was not to take lands under water in front of the lands so granted, but for a right of passage over lands adjoining and lying westerly of the lands under water, concerning which the covenant had been made. The court says on page 558:

> "It is not necessary to consider whether the right of eminent domain is not an essential attribute of the State's sovereignty, so paramount that it cannot be ceded away so as to preclude the legislature in any case from its exercise."

This quotation makes it plain that the case has no application.

(4) *New Castle R. R. Co. vs. Peru &c. R. R. Co.*, 3 *Ind.* 464 (1852).

In the charter of a railroad company there was a

clause to the effect that the company should be seized in fee simple of its lands and have the sole use and occupancy thereof. There was a further clause to the effect that no person, body, public or corporate, should in any way interfere with, molest, disturb or injure any of the rights or privileges granted by the act. The case raised a mere question of the interpretation of the corporation's charter. No constitutional question was raised in it. The court held that the first above-mentioned clause in the charter did not deprive the State of its power of eminent domain, and that the second clause above mentioned did not prohibit the State from chartering another and competing railroad company.

(5) *Illinois Canal vs. C. R. I. & P. R. R. Co.*, 14 *Ill.* 314 (1853).

This was a bill to restrain the railroad company from constructing tracks across the canal company's lands. The Supreme Court of Illinois followed *West River Bridge Company vs. Dix*, holding that an authority granted by a state to construct a canal, and giving it the exclusive right to collect tolls thereon, confers no exclusive right in any line of travel. At page 315, the court uses almost the very language of that case, and says that if the canal company is to have any right to forbid the conduct of traffic which would not naturally flow through the canal, this should be made to appear by clear contract. The court concedes (page 316) that if such was the design of the parties the contract must be enforced. The

case, therefore, so far as it bears upon the right of surrendering the power to take private property for public use, bears against Mills's doctrine, rather than in favor of it.

(6) *Rominger vs. Simmons*, 88 *Ind.* 453 (1882).

This case holds that property which has been taken for school purposes is liable to be taken for another public use.

(7) *West Virginia Transportation Co. vs. Ohio River Pipe Line Co.*, 22 *W. Va.* 600 (1883).

In this case the owner of land made a contract granting an exclusive right of way over his land. A corporation which had the power of eminent domain attempted to lay its lines over the same lands. This attempt was resisted by the holder of the contract. The Supreme Court of West Virginia held that the contract between the owner and the first pipe line company could not abridge or take away the State's right of eminent domain, and that such a contract between the owner and the licensee was void as against public policy.

(8) *Parmelee vs. Oswego R. R. Co.*, 7 *Barbour* (*N. Y.*), 599 (1850).

This case dealt purely with a construction of the constitution of the State of New York, which had forbidden the sale of certain lands lying adjacent

to certain salt springs. No constitutional question such as that here in issue was raised in the case.

Cooley in his *Constitutional Limitations* (7th Ed. 1903, p. 397), seems to content himself with a statement of his own view that the power of eminent domain cannot be the subject of a contract, and seeks to draw support for it from the *Charles River Bridge Case* and the *West River Bridge Case*, neither of which, as we have shown, hold any such doctrine.

VI. CASES IN THIS COURT CITED BY DEFENDANTS IN ERROR AND RELIED ON BY THE COURT BELOW.

A glance at the opinion (Transcript, pages 20 and 21) will show that after making the statement that the Hospital's contract could be taken and quoting two Pennsylvania cases as authority, the Supreme Court of Pennsylvania quoted two paragraphs from *Cincinnati vs. Louisville and Nashville Railway Company*, 223 *U. S.* 390, and then merely entered its decree of affirmance. We shall below state the Cincinnati case, and shall, we hope, explain that it has no bearing whatever upon a case like the present. The other cases cited in the excerpts from it have nearly all been stated and analyzed elsewhere in this brief. The *Charles River Bridge Case* and the *West River Bridge Case* have been stated and analyzed respectively on pages 43 and 46 of the brief. It remains to say a word of the other cases.

Cincinnati vs. Louisville and Nashville Railroad Company, 223 U. S. 390 (1912).

There a proprietor of land dedicated it to the city of Cincinnati for public use, as a common or park. The city accepted the dedication and on the faith of it, sold lots. Long subsequently, the State of Ohio by an act conferred upon elevated railroad companies chartered in that State the power to take an easement for the erection of elevated railroads over any public

lands owned by a city. The railroad company complied with the act and laid out a road over the land in question. The city attempted to restrain the railroad company. The bill was dismissed. This Court affirmed this decision, holding, as had so often been held before, that the power to take private property for public use included intangible as well as tangible property and that in these condemnation proceedings, **the contractual rights between the city** and the dedicator of the property were not impaired.

It will be observed that this was not a case in which the sovereign State of Ohio agreed not to exercise the right to take private property for public use. This Court held, upon the soundest principles, that the contract of dedication contained an **implied condition** that it was subject to the needs of the State in the exercise of its eminent domain.

How can it be said that the contract in the case at bar contains an "implied condition" that it is to be subject to the power of eminent domain, when it contains the **most explicit covenant directly to the contrary**? That the decision **in the Cincinnati Case actually** recognized the possibility of contracts like the one under discussion is shown by the following quotations (400):

> "Every contract, whether between the State and an individual or between individuals only, is subject to this general law. There enters into every engagement the unwritten condition that it is subordinate to the right of appropriation to a

public use. The *West River Bridge Co. vs. Dix, 6 How.* 507; *Long Island Water Supply Co. vs. Brooklyn*, 166 *U. S.* 691-2."

(Page 405):

"But the object and end of all government is to promote the happiness and prosperity of the community by which it is established; and **it can never be assumed**, that the government intended to diminish its power of accomplishing the end for which it was created. And in a country like ours, free, active, and enterprising, continually advancing in numbers and wealth, new channels of communication are daily found necessary, both for travel and trade, and are essential to the comfort, convenience, and prosperity of the people. A State ought never to be presumed to surrender this power, because, **like the taxing power**, the whole community have an interest in preserving it undiminished. And when a corporation alleges, that a State has surrendered for seventy years, its power of improvement and public accommodation, in a great and important line of travel, along which a vast number of its citizens must daily pass; the community have a right to insist, in the language of this court above quoted, **'that its abandonment ought not to be presumed, in a case, in which the deliberate purpose of the State to abandon it does not appear.'**"

This quotation is from *The Charles River Bridge Case*, (*supra*). The boldface is ours.

(Page 406):

"'* * * The rule of construction announced by the court, was not confined to the taxing power; nor is it so limited in the opinion delivered. On the contrary, it was distinctly placed on the ground that the interests of the community were concerned in preserving, undiminished, the power then in question; **and whenever any power of the State is said to be surrendered or diminished, whether it be the taxing power or any other affecting the public interest, the same principle applies, and the rule of construction must be the same.**'" (Boldface ours.)

Of course, the State in accepting the dedication, neither expressly nor impliedly contracted not to subject the land to another public use, which might be superimposed on the use for which it was dedicated. To hold that the imposition of a public use on a given tract, forever ties the hands of the State from later devoting it to another similar use, in the absence of any agreement by the State to that effect, would be to do the greatest violence to the fundamental conceptions of contract.

This case is merely a slightly varied application of the principles settled and applied in *West River Bridge Co. vs. Dix*, (*supra*).

New Orleans Gas Company vs. Louisiana Light Company, 115 U. S. 650, is actually an authority in favor of the plaintiff in error. There a state legislature in the exercise of the police power granted an exclusive franchise to a gas company covering the City of New Orleans. Later the legislature under a pretended exercise of the police power or the right of eminent domain, for in these cases the two rights really merge into one, attempted to authorize another gas company to do business in New Orleans in competition with the first one. This Court held, in a very strong opinion by Mr. Justice Harlan, that there was nothing about the grant of the exclusive franchise to the first company which was injurious to the health, the morals or the safety of the community; that the exclusive franchise granted was, of course, subject to regulation in the interest of the public health of safety and that there should be such regulation in the future was an implied term of the grant. He scouted, however, the idea that the destruction of the exclusive feature of the grant was an honest exercise of the police power, held that it constituted an impairment of the obligation of the contract made with the first company and that the legislature was without power by reason of Article I, Section 10 of the Constitution of the United States to destroy the exclusive feature of the first franchise.

He points out in the opinion that if the State of Louisiana desired to take the property of the first company for public use under the power of eminent

domain, that course was open to it. We entirely concur in this view. To take the property as a whole and pay for it, the value it had at the time of the taking, which value would, of course, be enhanced by reason of the fact that its franchise was exclusive, would in no sense impair the obligation of the contract that its franchise was to be exclusive. The State of Louisiana never contracted that it would not take the property of the New Orleans Gas Company for public use. What it did contract was that it would not take it indirectly or, to put it more narrowly, would not take the exclusiveness of the franchise, which is a distinct property right, by granting to any other company a competing right. The contract which it made with the first company was not a sweeping contract never to exercise the right of eminent domain. It was a much narrower covenant —a covenant not to exercise the state's sovereign power over the exclusive franchise in such a way as to injure it. That contract this Court enforced, just as it had enforced a similar contract in the Binghamton Bridge case (*supra*). The case under discussion, therefore, does not touch the issue in this case.

Long Island Water Supply Company vs. Brooklyn, 166 U. S. 685 (1896). This case is an equally clear one but it has no application to the case under discussion. A Water Supply Company was organized under a general law. That general law did not even give the Company an exclusive franchise within the territory for which it was incorporated, which was

a small town in the State of New York. The town made a contract with the Company for the supply of water to the town for a period of years. Subsequently the town was taken over and became a part of the City of Brooklyn and, of course, the City of Brooklyn became thereby a party to the contract theretofore entered into between the town and the Company. By the act which incorporated the town in question with the City of Brooklyn, the City was given power to purchase or condemn the property of the Company within two years, but it did not do so. Later the legislature passed an act authorizing the City to condemn the property of the Company. The City proceeded so to do but the Company objected on the ground that the existence of the contract between the town and the Company withdrew the property during the life of the contract from the scope of the power of eminent domain because the taking of the Company's tangible property would prevent the Company from supplying water, and would, therefore, operate to relieve the town from the payment of hydrant rentals. It goes without saying that the contention was without merit. Mr. Justice Brewer said, referring to this contention (page 689):

> "Such a decision would be far-reaching in its effects. There is probably no water company in the land which has not some subsisting contract with a municipality which it supplies, and within which its works are located, and a ruling that all those properties are beyond the

> reach of the power of eminent domain during the existence of those contracts is one which, to say the least, would require careful consideration before receiving judicial sanction."

He then proceeds to say that the vice of the argument is two-fold (page 690). First, it ignores the fact that the contract "is a mere incident to the tangible property" and that it is the tangible property which is being condemned and he says, "it still is true that the contract is not the thing which is sought to be condemned and its impairment, if impairment there be, is a mere consequence of the appropriation of the tangible property." In the second place, he suggests that even if the contract between the town and the Company be property, such a contract is liable to be taken in eminent domain.

Nothing could be clearer than the accuracy of this reasoning. Here we have no contract by the State of New York not to take this property. We have not even an exclusive franchise granted by the State of New York. We have a mere contract between what, so far as the State is concerned, are two private parties and the argument is made that because those private parties have made a contract concerning the property of one of them, that property is forever withdrawn from the power of eminent domain. The contention answers itself.

Offield vs. Railroad Company, 203 U. S. 372 (1906). This case is really authority for the proposition

that the condemnation of the minority holdings of stock in a corporation may, under certain circumstances, be a public use and that the mere fact that the ownership of such stock is in its nature intangible rather than tangible property is no obstacle to its being taken under the right of eminent domain. Incidentally the appellants contended that as the Railroad Company whose stock was to be taken by eminent domain was the lessee of the New Haven and Derby Railroad Company for ninety-nine years, the property was thereby withdrawn from the power of eminent domain because its exercise would impair the lease contract. This is the same contention that was made in *Long Island Company vs. Brooklyn, supra.* A further contention that the taking would impair the stockholders' contract right with the corporation received the little consideration from this Court which it deserved.

The above are all of the cases cited by the Supreme Court of Pennsylvania from this Court in support of its position.

VII. THE PENNSYLVANIA CASES RELIED ON BY DEFENDANTS IN ERROR.

Defendants in error, and the courts below have asserted that this case is ruled by several Pennsylvania cases. Of course, that cannot be true in this Court. Decisions of the Supreme Court of Pennsylvania, entitled as they are to the highest consideration, cannot bind this Court in the determination of this constitutional question. They must, moreover, be examined to see if they decide what defendants in error claim they decide.

In re Twenty-second Street, 102 *Pa.* 108 (1883).

A proceeding for the opening of a street through a cemetery owned by an incorporated association, which was incorporated in 1848. In 1849 a special act was passed which provided that, "no street * * * shall hereafter be opened through the land of" the association, "except with the consent of said corporation, nor shall the same be liable to be taken or used for any object not connected with or appertaining to burial purposes and shall be exempt from taxation for all purposes whatsoever."

In 1882, a petition was presented, under the general road law, for a Jury of View to report for or against the opening of Twenty-second Street. The jury filed a report in favor of the opening of the street through

the cemetery grounds, to which the Cemetery Company filed exceptions. The lower court dismissed the exceptions and confirmed the report of the jury, holding that the Act of 1849 was repealed by the Act of June 8th, 1881, P. L. 68, which gave the courts jurisdiction and direction of the opening, widening, narrowing, vacating and changing grades of all streets and provided that they might open streets at such points as might be deemed necessary, "any private or special statute to the contrary notwithstanding."

The opinion of Thayer, P. J., of the court of first instance, appears in 15 Phila. Rep. 409. He states that it is insisted that the act and its acceptance constitute a contract, and that the later act of assembly constitutes a breach of the contract against which the company is protected by the constitution. He then proceeds (page 410): "Conceding for the sake of the argument" that the act is a contract, nevertheless, contracts, like every other sort of property, are subject to the right of eminent domain. He cites *West River Bridge Company vs. Dix, supra; Rundle vs. Delaware and Raritan Canal Co.*, 14 *Howard*, 80, and *Fletcher vs. Peck, supra.* He then says (page 410):

> "It is not for us to attempt the task of reconciling these principles with those decisions of the Supreme Court of the United States cited by the defendants' counsel which in dealing with corporate rights have carried the principle of *Dartmouth College vs. Woodward*, 4 Wheaton, 418,

to results far beyond those arrived at in that case, and which hold that a State may by an act of its legislature place limits and restrictions upon itself in the exercise of attributes which are inherent in the frame of its government, and thus preclude itself from the use in particular cases of powers which are in their nature sovereign and inalienable. * * *"

But the real meat of the decision of the learned judge is found at the middle of page 411, where he says:

"But is it not conceding too much, and more than the facts warrant, to say that the act of 1849 constituted a contract between the State and the company? **The act was no part of the original charter, and so far as appears was without consideration. Now that a consideration must appear for the grant of a privilege which is to be resolved into a contract with the State, is evident from all the cases.** There must be a consideration, so that the State can be supposed to have received a beneficial equivalent, otherwise the exemption is a mere privilege or license which may be revoked at any time: *Christ Church Hospital vs. Philadelphia County*, 12 Harris, 229, a decision which was affirmed by the Supreme Court of the United States: *Christ Church vs. Philadelphia*, 24 Howard, 300. Other cases to the same effect may be found collected by Mr. Cooley, Const. Lim. 281. Now, there is

> no evidence in this case anywhere that the State received any consideration or equivalent whatever for the exemption granted to the company by the act of 1849, and without such consideration the exemption must be regarded as a mere privilege, the continuance of which depended upon the pleasure of the State, and which was liable to be withdrawn at its own volition at any time."

In the view expressed in the last paragraph quoted, the privilege or immunity granted by the legislature was at best a mere revocable license, or a declaration of legislative policy. It was without consideration, and therefore lacked the necessary essential of a contract. The immunity was not, as in so many other cases with which the Court is familiar, granted in a charter, the acceptance of which charter and the investment of money on the faith whereof, would constitute consideration.

The Supreme Court of Pennsylvania dismissed an appeal in an opinion which covers but a single page. Of this opinion more than half is merely a restatement of the facts and of the contention of the appellant. There was no extended discussion of the principles involved. All that the court said on the subject is the following (102 Pa. 115):

> "But the learned and able judge of the court below shows with great clearness that a contract, even if there be a contract in this case, is property, and is not more sacred than any other

species of property; that 'its obligation is not impaired but it is recognized when compensation is provided for its infringement.' A franchise may be taken or destroyed in the exercise of the right of eminent domain by the commonwealth as well as any other property. In re Towanda Bridge Company, 10 Norris, 216.

"The careful consideration given to this question by the court below renders a further discussion of it unnecessary. The reasons given and the authorities cited in the opinion of the learned judge fully vindicate his judgment."

The case shows the same confusion of thought which the opinion, likewise very brief, in the case at bar exhibits. As above shown, if there was a contract not to take the land for streets, it was either valid or invalid. If it was invalid then the land could be taken. If it was valid, then the land could not be taken. It is a hopeless confusion of thought to suggest that the valid contract not to take the land could itself be taken for public use.

But more important still, in the consideration of this case, is the fact that the legislature did not even make a contract with the company and did not purport to do so, but merely declared a legislative policy which should, until the legislature changed its views, extend an immunity to the company. It was a mere privilege, revocable at pleasure, and the learned court of first instance clearly so demonstrates. If this be true, then what the Supreme Court said about

the right to take the "contract" is the purest *dictum*, and one evidently expressed without extended consideration or investigation of the principles involved.

The case cited by the court of first instance is full to this point. It is

Christ Church Hospital vs. Philadelphia, 24 Pa. 229 (1855),

afterwards appealed to this Court and reported as **Rector, &c., of Christ Church vs. Philadelphia, 65 U. S. 300 (1860).** Except that it dealt with the exemption from taxation, and not with the taking of private property for public use, it is exactly analogous to *In re Twenty-second Street.* The hospital was an existing corporation. By an act of 1833, after reciting the good works of Christ Church Hospital, the legislature enacted that its property "shall be and remain free from taxes." By a subsequent act of 1851 it was provided that all property belonging to any association or incorporated company which is now by law exempt from taxation, other than that which is in the actual use or occupation of such association or incorporated company, and from which an income or revenue is derived by the owners thereof, shall hereafter be subject to taxation, &c.

Under this act certain real estate and ground rents of the hospital, which belonged to it before the passage of the act, were assessed for taxation, and the goods on the premises were levied for the taxes. The taxes were paid under protest and an action brought for their recovery. The Supreme Court of Pennsyl-

vania, by Chief Justice Lewis, held, referring to the act of 1833:

> "But no duty is imposed upon the institution as the consideration of the grant. It is required to do nothing It is left to pursue its own course as freely as before. There is, therefore, nothing in the statute of exemption which savors of contract. The legislature had the undoubted right to repeal the Act whenever the public exigencies required it. It is not necessary to review the decisions cited to prove that a state cannot pass a law impairing the obligation of a contract. They are entirely inapplicable to the case before the Court." (Page 232.)

On appeal to this Court, Mr. Justice Campbell said (65 U. S., page 302):

> "The plaintiffs claim that the exemption conceded by the act of 1833 is perpetual, and that the act itself is in effect a contract. This concession of the Legislature was spontaneous, and no service or duty, or other remunerative condition, was imposed on the corporation. It belongs to the class of laws denominated *privilegia favorabilia*. It attached only to such real property as belonged to the corporation, and while it remained as its property; but it is not a necessary implication from these facts that the concession is perpetual, or was designed to continue during the corporate existence."

* * * * * * * *

> "It is in the nature of such a privilege as the act of 1833 confers, that it exists *bene placitum*, and may be revoked at the pleasure of the sovereign."

The authority quoted by the Supreme Court in its opinion in In re Twenty-second Street, is

> *In re Towanda Bridge Company*, 91 *Pa.* 216 (1879).

The constitutional question now before the Court was not raised. Certain constitutional questions under the constitution of Pennsylvania were raised, one of which was whether property once devoted to a public use could, under the right of eminent domain, be condemned for the purposes of a new use. It was held that a bridge franchise is property and can be condemned along with the bridge, and this is all that the case holds.

The next Pennsylvania case relied upon by the defendants in error is

> *Lock Haven Bridge Company vs. Clinton County*, 157 *Pa.* 379 (1893).

This case really has no bearing upon the question at issue. A provision in the Bridge Company's Charter reserved to the legislature the right to purchase the bridge after a certain time by paying to the Company a sum to be computed in a certain manner. Proceedings under the law of eminent domain of the state were brought to free the toll bridge

and make it a public highway. The Bridge Company contended that the reservation of the power of purchase in the act incorporating the Bridge Company fixed the sole method of acquiring the bridge for public use. The trial Court and the Supreme Court of Pennsylvania both held that the reservation of the right of purchase did not constitute a contract not to take under the right of eminent domain. Chief Justice Sterrett said (page 388): that the Court was not convinced that the legislature "ever intended to thus surrender or barter away the right of eminent domain and substitute in lieu thereof the provision above quoted." He adds that the legislature was powerless to do so but, "assuming, for argument's sake, that it possessed the power, it did not attempt to exercise it."

Again on page 390 he said:

> "Other reasons might be suggested in support of the learned Judge's ruling, but we think the absence of express or implied legislative intention to surrender or restrict the exercise of the power of eminent domain is sufficient, without more, to justify the ruling complained of." * * *

This case, therefore, contains merely a *dictum* as to the power of the legislature to surrender the right of eminent domain and was decided on the ground that no such contract of surrender had in fact been made.

Commonwealth vs. Rapid Transit &c. Co., 219 Pa. 11 (1907).

In this case there occurs a statement by Mr. Justice Mitchell in the following words:

> "In addition to the argument of the commonwealth as to the intent and constitutionality of the Act of 1901, it is now argued for the railway company that the Act of 1873 was a contract with the state which cannot be abrogated. But it is conceded that one legislature cannot grant away the state's right of eminent domain so as to bind future legislatures: In re Opening of Twenty-second Street, 102 Pa. 108."

This language was used, as we submit, by way of pure *dictum*, the court having previously said (page 17) that its discussion of the points raised by the Commonwealth "might properly end the opinion"; but that since the private relator in the writ of *quo warranto* had raised certain other points, a brief notice of them might be made. It was in the subsequent portion of the opinion that the *dictum* above quoted occurred.

The facts of the case are complicated, and it is badly reported. A clear understanding of it will show that the constitutional question in issue in this case did not there arise.

In 1857 the legislature of Pennsylvania adopted an amendment to the then existing constitution of the State, to the effect that the legislature should have power to "alter, revoke or annul any charter

of incorporation heretofore conferred by or under any special or general law, whenever in their opinion it may be injurious to the citizens of the Commonwealth; in such manner, however, that no injustice shall be done to the corporators." (Pamphlet Laws, Pa. 1857, p. 811.)

Subsequently, by an act of May 16, 1861, Pamphlet Laws, 691, a street railway corporation was organized to lay out a route which, *inter alia*, covered Broad Street, Philadelphia, (see page 692). By an act of 4 April, 1868, Pamphlet Laws, 640, the said railway company was consolidated with another company, thus creating the Thirteenth and Fifteenth Streets Passenger Railway Company, whose charter right was, therefore, to run a line on Broad Street, Philadelphia. In 1866 the legislature passed an act (Pamphlet Laws, 299), devoting Broad Street to use as a public drive and forbidding any street railway tracks or other tracks to be laid in that street. As a result of a litigation between the city of Philadelphia and the Thirteenth and Fifteenth Streets Passenger Railway Company, which litigation, however, was never prosecuted to a conclusion, an agreement was entered into between the said passenger railway company and the commonwealth of Pennsylvania, which was embodied in an act of Assembly of 1873, whereby the railway company surrendered whatever rights it had to lay tracks in Broad Street, provided that no other railway company should be authorized to lay tracks in that street.

In 1901 the legislature passed an act which gave

any company incorporated under its terms the right to lay tracks in any street upon which no tracks then existed, where the right to lay such tracks had been surrendered by any other company by contract with the Commonwealth. This, of course, covered the exact case of the Thirteenth and Fifteenth Street Railway Company, which had so surrendered its rights in Broad Street. A corporation was formed under the act of 1901, whose route, *inter alia*, covered certain portions of Broad Street. At the relation of the Attorney General the Commonwealth issued a writ of *quo warranto* against this new company to determine its right to lay tracks in Broad Street. The court below held that the special act of 1866, forbidding that tracks should ever be laid in Broad Street had not been repealed by the act of 1901, and issued the writ of *quo warranto*. On appeal the Supreme Court of Pennsylvania held that the act of 1901 did repeal the act of 1866. The act of 1901 was further attacked under the constitution of Pennsylvania, on the ground that its title did not conform to the constitutional requirements. It was only these points that the Commonwealth pressed upon the appeal. The Supreme Court reversed the court below and quashed the writ.

The private relator argued that the act of 1873 constituted a contract whose obligation would be impaired by the act of 1901. The answer which was made by the defendant, and which seems to us was absolutely sound, was that at the time the Thirteenth and Fifteenth Streets Passenger Railway

Company received its charter, that charter was, by reason of the amendment of 1857 to the constitution of Pennsylvania, subject to amendment, alteration and repeal. This being so, the legislature could, by act of Assembly, at any time withdraw the privilege from the Thirteenth and Fifteenth Streets Passenger Railway Company, of running in Broad Street, and the act of 1901 amounted to no more than this. In this sense, therefore, and under these circumstances the learned Chief Justice was entirely accurate in saying that one legislature could not restrict the power of a succeeding legislature to exercise the right of eminent domain. The statement was true upon the facts of this case. Moreover, it was quite evident that the legislature, in passing the act of 1901, assumed that it was exercising its constitutional power of alteration, revocation and repeal of the charter rights of the Thirteenth and Fifteenth Streets Passenger Railway Company, because it provided definitely in the act for compensation to be paid to any company whose rights were injured or taken thereby.

We have examined the briefs filed in the Supreme Court of Pennsylvania in this matter, and find that much space was devoted to the constitutional amendment above mentioned, and that this matter was fully argued and was before the court when it made the statement which we have above quoted, concerning the right of the legislature.

VIII. THIS CONTRACT CANNOT BE "TAKEN" AS ASSERTED BY DEFENDANTS IN ERROR AND BY THE COURT BELOW.

The contention of defendants in error, that this contract can be "taken" by the state for public use, is clearly unsound. The action of the Quarter Sessions Court of Philadelphia in its order allowing a bond to be filed by the City of Philadelphia and ordering that the viewers to be appointed should assess the damage sustained by reason of the opening of the street and the damage by reason of the "taking" of the contract as separate items, was wholly unjustifiable. The state contracts not to take this land for streets. We are told that the state can take the land, if it also "takes" the contract. What does this mean?

The truth is that the city's action is "breaking" the contract and not "taking" it. A moment's reflection will show that **if the legislature had power to make** this contract it is a valid and enforceable contract. If it is enforceable, the city cannot take this land for streets. If, on the other hand, the legislature had not the power to make the contract, then it may take the land for streets, because, in that case, the attempted contract never had validity or life; it is as if it had never been written. Either of the above positions is **theoretically** tenable. If you start with either hypothesis as to the legislative power you move logically to the correlative result. But

the two positions are mutually exclusive. Either there is a contract or there is not. It is sheer moonshine to say that peradventure there is a contract but, if there is, it may be taken just as the land may be taken—under the power of eminent domain.

The Supreme Court of Pennsylvania fell into the same confusion of thought. (See Opinion, Transcript, p. 20.) The court "concedes" for the sake of argument that the act of 1854 is a contract, and then goes on to say that the "contract" may be taken and compensation made to the owner of it.

This is simply a misapplication of the doctrines this Court has so often announced, that a "franchise" may be taken, that an "exclusive franchise" may be taken; or that a contract **between two parties, neither of whom is the State,** cannot stand in the way of the exercise by the State of its sovereign power; or that if a contract be made by the State, **the property acquired by a citizen as a result of that contract** (not the contract) may be taken, because all are presumed to contract with this fact in view; or, as it has been put, that it is a term of every contract with the state that the contract **is subject** to the eminent domain. But here we have an **express contract** by the state not to exercise that power in a certain way. **It cannot be said that the same contract contains an implied term which is in the teeth of the express covenant.**

May we be permitted to point out that if the right to take private property for public use extends to contracts made by the state, the simplest possible

expedient will enable a state to evade the prohibition of Article I, Section 10 of the Constitution. It may not "impair the obligation" of the contract, but it may "take" the contract.

Why then, could not the states "take" the contracts of tax exemption in the tax cases? Why could not Georgia have "taken"—not the land granted—but—the covenant of quiet enjoyment involved in Fletcher vs. Peck? The obligation (if any) to make compensation was, prior to the adoption of the Fourteenth Amendment, founded solely on the state constitution. If no compensation be made, this Court, concerned only with the Federal constitution, cannot take jurisdiction under Article I, Section 10. It is seen that Article I, Section 10 becomes meaningless.

Is the contract in this case *qua* the State property? If it is, then for the first time in the history of our law, one who has a contract with another **owns property** belonging to that other. We freely concede that a contract **right** which A has under a contract between himself and B, is as to third persons "the property" of A. A may sell his rights to a third person, and they may be taken from him by execution or attachment. The State may conceivably, under the right of eminent domain, appropriate A's rights under the contract and substitute itself in his place and call on B for performance in A's stead.

But what can it mean to say that B, the other party to the contract, can "take" or "appropriate"

A's "property" in the contract? As between A and B only, **there are no "property" rights** which one has as against the other in the contract. Their reciprocal rights are contractual and not proprietary, they are the subject of breach, or of rescission, but not of ownership or sale *inter se*.

Speaking of a case of tax exemption by legislative contract, Mr. Justice McReynolds said in **Morris Canal Co. vs. Baird,** 239 U. S. 126 (1915):

> "Although the obligations of such a contract are protected by the Federal Constitution from impairment by the State, **the contract itself is not property,** which, as such, can be transferred by the owner to another, because, being personal to him with whom it was made, it is incapable of assignment." (p. 131.) (Boldface ours.)

IX. THERE IS NO QUESTION HERE OF THE EXERCISE OF THE POLICE POWER.

The defendants in error laid much stress in the court below on the doctrine that no state can bargain away its police power. Rightly understood, this doctrine is sound and undoubtedly expresses the law.

At the outset however, it must be pointed out that this case was not and could not properly have been disposed of under that doctrine.

The taking of private roperty for public use is not the same thing as the exercise of the police power. One is a **taking** of concrete property, and by constitutional restriction, compensation must be made. The other is a regulation of conduct in the interest of the health, safety or morals of the people, and may indirectly affect the use or value of private property. The result upon private property is *damnun absque injuria.*

Property is taken for public use as a part of the **business administration** of government. Conduct is **regulated** in the interest of the preservation of government. It seems too plain to need argument or citation of authority, that when, on the face of an act, it appears the legislature has attempted to abdicate the right to regulate the conduct of the citizen in the interest of the whole people, it has gone beyond the mere authority of an agent, and

attempted to destroy the very principal it represents.

Every franchise, every grant, every charter, every contract of the State is subject to the effects, however serious or burdensome, which flow from police regulations adopted in the interest of the community's health, morals or safety.

To take the present case as an example, police regulations might conceivably be adopted which would render it no longer possible for the Pennsylvania Hospital to conduct its insane department in the City of Philadelphia. However serious a loss these might entail, the hospital would have to yield, and go without compensation. Moreover, no contract, no matter how specific, could save it from such regulation, if a proper exercise of the police power.

But no arbitrary act of power which destroys or impairs the obligation of a contract can be cloaked under the pretended exercise of the police power.

New Orleans Gas Co. vs. Louisiana Light Co., 115 U. S. 650 (1885) at pages 660, 662, 664, 671;

Grand Trunk Western Ry. Co. vs. South Bend, 227 U. S. 544 (1913).

X. THE PROPERTY OF PLAINTIFF IN ERROR IS STILL SUBJECT TO THE EXERCISE OF THE POLICE POWER AND TO THAT OF THE EMINENT DOMAIN.

As we have just shown, the plaintiff's insane hospital is subject to police regulation. No one would suggest that there is any covenant by the State to the contrary; or that, if there were, it would have any force.

But plaintiff's lands are also subject to be taken for public use. There is no covenant not to take the whole plot, or any part of it, for parks, for railroads, for reservoirs or for the countless other public uses to which it might be put. The covenant is a very restricted one—that, so long as used for an insane hospital, no street shall be cut through the grounds. The Act is a purely administrative contract, made in the exercise of the sovereignty of the state upon a valid consideration, and for the promotion of a public and charitable use. If that use should be superseded by another public use, the grounds may be taken,—but while the use continues, the work must not be hampered by cutting up the grounds of the hospital with streets.

As in the cases cited at pages 43 and 63 of this brief, the legislature has merely contracted for a limited time that to exercise a governmental power with respect to specific property in a particular limited way—it has promised nothing more.

XI. THE FACT THAT SIMILAR QUESTIONS COULD NOT NOW ARISE BECAUSE THE PEOPLE HAVE SINCE SEEN FIT TO LIMIT THE POWER OF THEIR REPRESENTATIVES, ONLY ADDS POINT TO THE ARGUMENT THAT THE POWER TO MAKE THIS CONTRACT EXISTED IN 1854.

No such contract as that before the Court could now be made. The people of the States have in the constitutions now in force, withdrawn from their representatives the authority to make such bargains. This has been done either by provisions forbidding special legislation granting peculiar immunities and privileges to any person or corporation, or by clauses in the bills of rights, forbidding the abridgement of the exercise of the right of eminent domain or both. As bearing particularly on this case, we have quoted in an appendix the provisions inserted in the Constitution of 1873 of Pennsylvania. Both of these clauses appear for the first time in Pennsylvania in the Constitution of 1873. That it was felt necessary to insert them argues strongly that the people believed that before the adoption of that instrument, there were no such restrictions upon the legislative power.

XII. SUMMARY.

We contend:

That we invoke a legislative contract, made in the administration of the State's business, upon a valid consideration, and to effect a necessary and laudable public use.

That on the faith of it, the plaintiff has expended moneys in the promotion of the public welfare.

That it has been many times decided that the legislature may by contract, provided it is clearly expressed, surrender or restrict sovereign powers, in the absence of constitutional prohibition.

That the legislature of Pennsylvania, the repository of the powers of government, had the right and authority to make that contract, there being nothing in the Constitution of Pennsylvania reserving such authority.

That the contract so made could by reason of the sovereignty of the State, have been revoked, annulled or impaired, except for the surrender by the State of the power of impairment by its agreement to Article I, Section 10, of the Constitution of the United States.

That that section forbids the impairment.

That such contracts are strictly construed and nothing is presumed to have been surrendered by the State; but

That it is a travesty on reason and logic to say

that a contract not to exercise the right of eminent domain in a particular way contains an "implied term" that the right may be exercised in that very way, or to put it otherwise, that the covenant not to take the land, may itself be taken.

Respectfully submitted,

OWEN J. ROBERTS,
CHARLES BIDDLE,
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Attorneys for Plaintiff in Error.

Philadelphia, August, 1917.

APPENDIX.

Below are first given the provisions of the Constitution of Pennsylvania of 1838, dealing with the powers of the legislature.

Then are printed the prohibitions of the Constitution of 1873 applicable to the present issue.

I. Constitution of Pennsylvania of 1838.

(In force in 1854)

See Thorpe's *American Charters, Constitutions and Organic Laws*, Washington Government Printing Office (1909), Vol. 5.

Page 3104:

"Article I
of the Legislature

"Section 1. The legislative power of this commonwealth shall be vested in a general assembly, which shall consist of a senate and house of representatives."

Page 3105:

"Sec. 14. The legislature shall not have power to enact laws annulling the contract of marriage in any case where, by law, the courts of this commonwealth are, or hereafter may be, empowered to decree a divorce."

Pages 3113-14-15:

"Article IX

Declaration of Rights

"That the general, great, and essential principles of liberty and free government may be recognized and unalterably established, we declare—

"Section 1. That all men are born equally free and independent, and have certain inherent and indefeasible rights, among which are those of enjoying and defending life and liberty, of acquiring, possessing, and protecting property and reputation, and of pursuing their own happiness.

"Sec. 2. That all power is inherent in the people, and all free governments are founded on their authority, and instituted for their peace, safety, and happiness. For the advancement of those ends, they have at all times an unalienable and indefeasible right to alter, reform, or abolish their government, in such manner as they may think proper.

"Sec. 3. That all men have a natural and indefeasible right to worship Almighty God according to the dictates of their own consciences; that no man can of right be compelled to attend, erect, or support any place of worship, or to maintain any ministry, against his consent; that no human authority can, in any such case whatever, control or interfere with the rights of conscience; and that no preference shall ever be given, by law, to any religious establishments or modes of worship.

"Sec. 4. That no person who acknowledges the being of God and a future state of rewards and

punishments, shall, on account of his religious sentiments, be disqualified to hold any office or place of trust or profit under this commonwealth.

"Sec. 5. That the elections shall be free and equal.

"Sec. 6. That trial by jury shall be as heretofore, and the right thereof remain inviolate.

"Sec. 7. That the printing-presses shall be free to every person who undertakes to examine the proceedings of the legislature or any branch of government; and no law shall ever be made to restrain the right thereof. The free communication of thoughts and opinions is one of the invaluable rights of man; and every citizen may freely speak, write, and print on any subject, being responsible for the abuse of that liberty. In prosecution for the publication of papers investigating the official conduct of officers, or men in a public capacity, or where the matter published is proper for public information, the truth thereof may be given in evidence; and in all indictments for libels the jury shall have a right to determine the law and the facts, under the direction of the court, as in other cases.

"Sec. 8. That the people shall be secure in their persons, houses, papers, and possessions from unreasonable searches and seizures; and that no warrant to search any place, or to seize any person or things, shall issue without describing them as nearly as may be, nor without probable cause, supported by oath or affirmation.

"Sec. 9. That in all criminal prosecutions the

accused hath a right to be heard by himself and his counsel, to demand the nature and cause of the accusation against him, to meet the witnesses face to face, to have compulsory process for obtaining witnesses in his favor, and, in prosecutions by indictment or information, a speedy trial by an impartial jury of the vicinage; that he cannot be compelled to give evidence against himself, nor can he be deprived of his life, liberty, or property, unless by the judgment of his peers or the law of the land.

"Sec. 10. That no person shall, for any indictable offence, be proceeded against criminally by information; except in cases arising in the land or naval forces, or in the militia when in actual service in time of war or public danger; or by leave of the court for oppression and misdemeanor in office. No person shall for the same offence be twice put in jeopardy of life or limb, nor shall any man's property be taken or applied to public use without the consent of his representatives and without just compensation being made.

"Sec. 11. That all courts shall be open, and every man, for an injury done him in his lands, goods, person, or reputation, shall have remedy by the due course of law, and right and justice administered without sale, denial, or delay. Suits may be brought against the commonwealth in such manner, in such courts, and in such cases as the legislature may, by law, direct.

"Sec. 12. That no power of suspending laws shall

be exercised, unless by the legislature or its authority.

"Sec. 13. That excessive bail shall not be required, nor excessive fines imposed, nor cruel punishments inflicted.

"Sec. 14. That all prisoners shall be bailable by sufficient sureties, unless for capital offences, when the proof is evident or presumption great; and the privilege of the writ of *habeas corpus* shall not be suspended, unless when, in cases of rebellion or invasion, the public safety may require it.

"Sec. 15. That no commission of oyer and terminer or jail-delivery shall be issued.

"Sec. 16. That the person of a debtor, where there is not strong presumption of fraud shall not be continued in prison after delivering up his estate for the benefit of his creditors in such manner as shall be prescribed by law.

"Sec. 17. That no *ex post facto* law, nor any law impairing contracts, shall be made.

"Sec. 18. That no person shall be attainted of treason or felony by the legislature.

"Sec. 19. That no attainder shall work corruption of blood, nor, except during the life of the offender, forfeiture of estate to the commonwealth; that the estates of such persons as shall destroy their own lives shall descend or vest as in case of natural death; and if any person shall be killed by casualty, there shall be no forfeiture by reason thereof.

"Sec. 20. That the citizens have a right, in a peaceable manner, to assemble together for their

common good, and to apply to those invested with the powers of government for redress of grievances, or other proper purposes, by petition, redress, or remonstance.

"Sec. 21. That the right of the citizens to bear arms, in defence of themselves and the State, shall not be questioned.

"Sec. 22. That no standing army shall, in time of peace, be kept up, without the consent of the legislature; and the military shall, in all cases and at all times, be in strict subordination to the civil power.

"Sec. 23. That no soldier shall, in time of peace, be quartered in any house without the consent of the owner, nor in time of war but in a manner to be prescribed by law.

"Sec. 24. That the legislature shall not grant any title of nobility or hereditary distinction, nor create any office the appointment to which shall be for a longer term than during good behavior.

"Sec. 25. That emigration from the State shall not be prohibited.

"Sec. 26. **To guard against transgressions of the high powers which we have delegated, we declare that everything in this article is excepted out of the general powers of government, and shall forever remain inviolate.**"

See for same matter:

Constitutions of Pennsylvania, Harrisburg, Pa.,
William Stanley Ray, State Printer (1916), pages 129; 149 to 154.

II. The Present Constitution of Pennsylvania; that of 1873.

"Article III

Legislation

"Section 7. The General Assembly shall not pass any local or special law:

* * *

"Exempting property from taxation:

* * *

"Creating corporations or amending, renewing or extending the charters thereof:

* * *

"Granting to any corporation, association or individual any special or exclusive privilege or immunity:"

Thorpe's American Charters, Constitutions and Organic Laws (*supra*), Vol. 5, page 3125, ff.

Article XVI, Sec. 3:

"The exercise of the right of eminent domain shall never be abridged or so construed as to prevent the General Assembly from taking the property and franchises of incorporated companies, and subjecting them to public use, the same as the property of individuals; * * *" (Page 3145)

For same matter see:

Constitutions of Pennsylvania, Harrisburg, Pa.,
William Stanley Ray, State Printer (1916), page 62.

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No. 349.

OCTOBER TERM, 1917.

Supreme Court of the United States

THE CONTRIBUTORS TO THE PENNSYLVANIA HOSPITAL, Plaintiff in Error,

vs.

THE CITY OF PHILADELPHIA, THOMAS B. SMITH, Mayor; GEORGE E. DATESMAN, Director of the Department of Public Works; WILLIAM H. CONNELL, Chief of the Bureau of Highways, Defendants in Error.

IN ERROR TO THE SUPREME COURT OF THE STATE OF PENNSYLVANIA.

BRIEF FOR THE CITY OF PHILADELPHIA *ET AL.*, DEFENDANTS IN ERROR.

JOSEPH G. MAGEE,
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In the Supreme Court of the United States.

OCTOBER TERM, 1917. NO. 349.

The Contributors to the Pennsylvania Hospital, Plaintiff in Error,

vs.

The City of Philadelphia; Thomas B. Smith, Mayor; George E. Datesman, Director of the Department of Public Works; William H. Connell, Chief of the Bureau of Highways, Defendants in Error.

IN ERROR TO THE SUPREME COURT OF THE STATE OF PENNSYLVANIA.

BRIEF OF THE CITY OF PHILADELPHIA, ET AL., Defendants in Error.

STATEMENT BY DEFENDANTS IN ERROR OF THE QUESTION INVOLVED.

The single question involved in this case is whether the action of the City of Philadelphia in taking by right of eminent domain a strip of land for a street (Forty-fourth) through the property of the Pennsylvania Hospital in said City, is in violation of Article I, Section 10, of the Constitution of the United States, providing that:—

> "No State shall * * * pass any * * * law impairing the obligation of contracts * * *"

DEFENDANTS IN ERROR'S STATEMENT OF THE CASE.

In 1836 the Hospital Corporation purchased a tract of land situated in what is now the Twenty-fourth Ward of the City, bounded on the north by Haverford Avenue, on the east by Forty-second Street, on the west by Forty-ninth Street and on the south by Market Street and Powelton Avenue.

It appears from the Record (in the Motion to Advance the Cause):—

> "That the said tract of land owned by the plaintiff in error extends from Forty-second Street to Forty-ninth Street, and is intersected by no streets except Forty-sixth Street, from Market Street to Haverford Avenue; Forty-third, Forty-fourth, Forty-fifth, Forty-seventh and Forty-eighth Streets remaining unopened; that from Forty-second Street to Forty-sixth Street is a distance of 2030 feet, and from Forty-sixth to Forty-ninth Street is a distance of 1728 feet—the regular and ordinary distance between such streets in the City of Philadelphia is 450 feet.
>
> "That in the neighborhood and vicinity of the said tract of land the population of the City of Philadelphia has become very large and that the progressive increase thereof is being constantly maintained. That on all sides of the said tract of land this increase of population is taking place. That Market Street is the principal street of the City of Philadelphia, and that traffic between the sections on the northern and southern sides of the said tract of land is very great and can now only be carried on through the said Forty-sixth Street."

The Legislature of Pennsylvania on April 17th, 1854 (P. L. 385) enacted:—

> "That no streets * * * shall ever be opened through the property * * * without the consent

of the said corporation, so long as the said property is used for the purposes of their Insane Department * * * Provided, That said corporation shall contribute one-half the ground for an avenue on their East, and one on their West line * * *"

The corporation conveyed the said ground for avenues, which is now used as city streets, and has ever since used the property for the purpose of its Insane Department.

The granting of legislative immunities of this character had become a common practice. It is illustrated not only in this case but in the case of the opening of Twenty-second Street, 102 Penna., page 108, referred to later in this brief. Another instance is the Act of March 19th, 1838 (Laws of Pennsylvania 1837–38, page 126), by which the Monument Cemetery Association of Philadelphia was incorporated, and by Section 4 of which Act the right of the City to open streets through the cemetery was greatly limited. By the fifth section of the same Act another Cemetery Company, called the Lafayette Cemetery Society of Philadelphia, was incorporated with the like privilege, and by the later Acts of March 15th, 1847 (Laws of Penna. 1847, page 346), and of March 12th, 1849 (Laws of Pennsylvania 1849, page 157), the prohibition to open streets or roads through these cemeteries was made absolute; the language of Section 3 of each of the two later acts being that, "No streets or roads shall hereafter be opened through the lands of the said Cemetery Company occupied as a burial ground, except by and with the consent of the management thereof."

These are but examples of the many statutory exemptions from the opening of streets through tracts of land situated in the then outlying and semi-rural communities adjacent to the City of Philadelphia, but which, through the consolidation of the whole of Philadelphia County into the City of Philadelphia, have become portions of the City proper. Meanwhile, the population was increasing in density; the built-up section of the City extended to

and far beyond these localities, and the result was that at many points normally in the lines of urban development the progress thereof was hindered and arrested. This was true, not alone of Philadelphia, but of the other cities of the State, for it had become the fashion to secure from the legislatures sitting in the early decades of the nineteenth century, with or without a consideration therefor, the statutory right to hold tracts of land free from liability to have streets or roads laid out through them, insofar as the Legislature might have any power to confer such a privilege. These conditions had become so menacing to the progress of Philadelphia and the other cities of the Commonwealth that the Legislature of the State of Pennsylvania on June 8th, 1881 (P. L. 68), declaratory of the Act of May 23d, 1874 (P. L. 235), which provides the method of procedure in the Courts of Quarter Sessions to assess the damages for opening streets, &c., enacted:—

> **"Section 13. That the municipal authorities and courts having jurisdiction in any city of this commonwealth, shall have exclusive control and direction of the opening, widening, narrowing, vacating and changing grades of all streets, alleys, and highways within the limits of such city, and may open or widen streets, at such points, and of such width, as may be deemed necessary by such city authorities and courts, any private or special statute to the contrary notwithstanding; proceedings to be had in such cases as are now required by law. Streets commenced under any special authority shall be completed unless otherwise decided by councils; and any of said cities may, with the consent of the courts of quarter sessions of the proper county, enter security for damages to private property by reason of street improvements, in such sum or sums as the said courts may direct."**

The City, under the Act of June 8th, 1881, and its own Ordinances, all held valid by the highest Court of the

State, and by a course of procedure likewise held to be in due and legal form, by virtue of its power of eminent domain, proceeded after due notice to provide for the opening of Forty-fourth Street through the property.

For this purpose a petition was filed in the Court of Quarter Sessions of Philadelphia County for leave to enter security by the City for any damages to the Contributors to the Pennsylvania Hospital which might result from the taking. The Contributors filed an Answer to the Petition, in which the right of the City to open the street was resisted upon the same grounds which were afterwards set up in the bill in equity now before this Court. At the hearing in the Court of Quarter Sessions upon such petition and answer, as soon as it became clear to the eminent counsel who then represented the Contributors, the late John G. Johnson, Esq., that the City had no intention of confiscating the contract rights of his client, but intended to pay any damages occasioned by their condemnation, the opposition was withdrawn, the Court making an order that the Viewers before whom the question of damages should come were to assess separately the value of the strip of land taken and the amount of additional damages, if any, due to the action of the City in ignoring such contract rights as the present plaintiff in error might possess by virtue of the Act of April 17th, 1854 (Transcript pages 11-12). The bond of the City was thereupon filed (Transcript, page 10). Afterwards an Injunction was applied for to the Court of Common Please of Philadelphia County to restrain the opening of the street, which, after hearing upon Bill and Answer, was refused. Upon appeal to the Supreme Court of the State of Pennsylvania the decision of the lower Court was affirmed. An Appeal to this Court was then taken.

There is no question involved except the single one above set forth.

ARGUMENT.

CONTENTIONS OF THE RESPECTIVE PARTIES.

The plaintiff-in-error, admitting the power of the City to take its "whole plot, or any part of it, for parks, for railroads, for reservoirs or for countless other public uses" (Brief of Plaintiff in Error, page 111) contends that "so long as used for an insane hospital *no street* shall be cut through the grounds."

It insists that the Act of 1854 and its acceptance constitute a *contract*, and the action of the City *impairs that contract* within the meaning of Article I, Section 10 of the Constitution of the United States.

The contention of the City is that the Act of 1854 (constituting the alleged contract) was not a binding and irrepealable contract between the parties; it was either ultra vires and void ab initio, or voidable either by the Legislature which enacted it, or, at all events, subject to annulment or repeal by any subsequent Legislature, upon due compensation being made; and that

Whatever its force and effect, the said contract is but property, and subject to condemnation and appropriation as is all other property. The proceedings in the Quarter Sessions as amended (Transcript 11-12) and the bond entered therein as "required by law" afford to the plaintiff in error all the protection to which they are legally entitled. Therefore—

That the plaintiff in error has no existing rights under the Act of 1854, which are not subject to condemnation; and that they are protected under the proceedings in the Quarter Sessions, which furnish the Appellants a full and adequate remedy at law for all damages which they may suffer.

NATURE OF THE RIGHT OF EMINENT DOMAIN.

It is apparent that the question involved in this appeal is to be determined by the application of the principles of the law of eminent domain, and by the application of those principles only. The proceeding is one of Eminent Domain, certain general principles of which are as follows:—

> "Eminent domain is the right of the nation, or the State or of those to whom power has been lawfully delegated, to *condemn private property for public use* and to appropriate the ownership and possession of such property for such use *upon paying the owner a due compensation*, to be ascertained according to law." 15 Cyc. 557.
>
> **"Eminent domain is a right inherent in all sovereignties and therefore would exist without any constitutional recognition; and its exercise by the government does not involve the commission of a tort. The right of eminent domain antedates constitutions which are only declaratory of previously existing universal law and is not conferred but limited by them. The right can only be denied or restricted by fundamental law and is 'a right inherent in society.' * * * The Legislature itself, having the right by Constitution to take private property for public purposes, cannot divest itself of such right by contract and much less can one Legislature deprive any subsequent Legislature of the power.** In the exercise of the power of eminent domain there is nothing in the nature of a contract between the owner and the State * * * the owner's assent is not required, and his objections are of no avail; all that is required is that a just compensation shall be made to the owner." *Id.* 557-559.
>
> **"The charter of a corporation, like other contracts, is made subject to the right of eminent domain in**

the State, and the property of a corporation and its franchises may be taken for public uses like the property of individuals without violating the obligation of a contract. This right of eminent domain may be exercised by the State, even though the powers of the corporation are thereby suspended or the corporation actually dissolved; but **in such case adequate compensation must be made to the corporation."** 8 Cyc. 975.

"A franchise must be surrendered up for a public use, like any other property, upon compensation being made, although where the franchise belongs to a corporation it constitutes an inviolable contract with the State. The grant of a franchise is of no higher order, and confers no more secure title, than a grant of land to an individual; and when the public necessities require it, the one as well as the other may be taken for public purposes on making suitable compensation; nor does such an exercise of the right of eminent domain interfere with the inviolability of contracts." 15 Cyc. 607.

These views are fully sustained by the accompanying citations.

In Mills on Eminent Domain, 2d Ed. 1888 (Sections 37 to 41) it is stated:—

"The right of individuals in and to property contained in their contracts of transfer are protected by the Constitution, **but this does not interfere with the power of the State to condemn property thus affected, on giving due compensation. The property and the contracts must yield to the demands of the sovereign** * * *. A State may not annul or modify a grant of land, or a lease, or a mortgage on it, but it may take the land for public use on making compensation. Such an appropriation does not impair the obligation of the contract contained in the grant or lease, or the covenants of warranty, or for

quiet enjoyment, or of the encumbrance upon the land. * * *

(Section 40) "The power of eminent domain is one of the essential incidents of sovereignty, and one Legislature cannot contract with a corporation that its property shall not be taken by the exercise of eminent domain. *Such provision has no binding force upon a subsequent Legislature, the contract being void as against public policy.* There is no such thing as an extinction of the right of eminent domain. **Even where a special act grants perpetual immunity against the opening of a street through a given tract, a street may nevertheless be opened through the tract under the exercise of the right of eminent domain.** * * * The word 'forever' would mean until the Legislature otherwise directed. * * * The contracts or conveyances of a municipal corporation do not prevent a subsequent condemnation of the property * * *" See also Sections 42-44.

In Lewis on Eminent Domain, Volume 2, 3d Ed. (of 1909,) Sections 411-416, these propositions are elaborated. Thus (Sec. 411):—

"All kinds of property and every variety and degree of interest in property may be taken under the power of eminent domain, 'the right of eminent domain is an attribute of sovereignty, and whatever exists in any form, whether tangible or intangible, may be subject to the exercise of its power, and may be seized and appropriated to public use when necessity demands it.'"
* * *

(Section 413) "In regard to choses in action, and all other kinds of personal property there can be no doubt as to the power of appropriation. Claims of citizens against a foreign power, or their goods and chattels, may be taken by the National Government for the purpose of adjusting its relations with such power. *So a claim for damages to land by reason of*

an unlawful entry thereon may be taken and adjusted in a proceeding to take the land itself. * * * All contracts and rights secured thereby may be taken or impaired for the public use."

(Section 414) "*A State may authorize property to be taken from its own grantee. Such a taking does not impair the obligation of any contract, it being an implied condition of all grants by the State that the property conveyed shall be subject to the power of eminent domain.* So a city may take, for public uses, property which is held by grant from itself, and notwithstanding its covenant for quiet enjoyment. * * * The State may condemn property which it occupies under a lease, and notwithstanding a covenant to surrender possession of the premises at the expiration of the lease. *And generally the existence of contracts between the condemnor and the owner respecting property sought to be taken, will be no bar to the condemnation, although they may affect the amount of compensation.* 'All contracts are subject to the power of eminent domain whenever the public necessity requires its exercise, and must be regarded as made with reference thereto.'" * * *

(Section 416) "Where a street is opened reserving in the proprietor certain wharfage rights, another proceeding may be instituted to condemn such rights (Page *vs.* Baltimore, 34 Md. 558). * * * So where land was conveyed to a railroad with the reservation of a ferry landing and right of way across it, the company may condemn the rights so reserved. And generally the existence of contracts between the parties to the condemnation, respecting the land involved, do not affect the right to condemn."

The use of italics and bold face type in the foregoing citations and elsewhere throughout this brief, unless otherwise noted, is ours.

Other sections of this work which deal with these and cognate questions are Section 10, page 21, with notes and

citations, Sections 406, 407, 408, 409, Section 215, Sections 438 and 439. In these the foregoing views are repeated and emphasized, and the cases cited in support of them are neither limited in number nor of doubtful application, as plaintiffs in error contend. Columns of the names of cases are found in the notes to these sections, so numerously that it would be tedious even to make a list of them, and they are entirely in accordance with the conclusions which the writer draws from them. The same results follow from an examination of the work of Mr. Mills. In various portions of the book other than those referred to above the same doctrines are enunciated, and hosts of authorities cited in support of them.

In the 7th Edition of Cooley's Constitutional Limitations, on page 398, etc., on pages 754-55, and in other parts of the book these subjects are discussed and great numbers of citations marshalled to support the same views. On page 399 of the latter work there is a most interesting note, with a considerable excerpt from Greenleaf's Edition of Cruise on Real Property, showing that the editor of that work shares the opinions of Judge Cooley on the subject.

In Elliott on Roads and Streets, 2nd Edition, Section 182, page 195 the right to seize private property for public roads and streets is declared to be an inherent attribute of sovereignty not conferred by constitutions but only limited and regulated by them In Section 186, that condemnation under the right of eminent domain does not impair the obligations of contracts, but fully recognizes them. See the citations in notes 1 and 2 to that section; that the Legislature alone has the power to determine the necessity for taking property, provided it be for a legitimate public use, and may determine how much or how little is needed for the public purpose; Section 189, pages 199 and 200. *And in Sections 216 and 223 it is clearly shown from the cases cited that either part or all of a corporate franchise may be taken; that its tangible property may be condemned without the franchise, or the franchise without the property, in the discretion of*

the legislative body. An easement may be taken by condemnation leaving the fee in the property owner; or, if it be so provided by statute, the entire fee may be taken.

The same conclusions from the adjudicated cases are reached by Judge Dillon in his work on Municipal Corporations. See (5th Edition) Sections 1019 and notes, 1023-24-25-26-27, 1103, 1313 and many others, together with the abundant citation of authorities supporting the text.

In Redfield on the Law of Railways (6th Ed., Vol. 1, Section 70, Clauses 10-12, page 268), similar views find expression. In note 14 to clause 10 the author says, affirming that a stipulated charter grant of exclusive privileges may itself be appropriated by eminent domain on making due compensation—"This doctrine has been repeatedly asserted in all the courts of the country."

Equally decisive language is used in the cases quoted in notes 15 and 16, pages 268–9, as to the lack of authority in the Legislature to part with the State's power of eminent domain "on any consideration or pretense whatever."

THE DOCTRINE OF EMINENT DOMAIN IN PENNSYLVANIA—CONSTITUTIONAL PROVISIONS.

The law of Pennsylvania is set forth in White's Constitution of Pennsylvania (1907) in Chapter 26, page 457, as follows:—

> "SECTION 1. Every sovereignty has certain rights in all property within its jurisdiction, even though it be owned by private persons. The earliest form of property holding was by communities rather than by individuals. Subsequently private ownership became a recognized fact under the protection of the law, *but the sovereign power still retained its right to resume the ownership of property whenever the exigencies of the public welfare should require it.* Such resumption of public ownership would necessarily

destroy private rights, but the duty of the sovereign to compensate private owners for property so taken was not recognized until within comparatively modern times. Even in England the instances are many of the confiscation of private property without compensation, for the use of the crown. More recently the right of the individual to be compensated has been protected, *but the power of the sovereign to take private property when the necessities or convenience of the public may require it, rendering proper compensation therefor, has been fully preserved. This is what is known as the power of eminent domain and is inherent in sovereignty.* The term 'eminent domain' is an indication of a right of property superior to that of the private persons who possess it. It has also been applied to the power of the sovereign to regulate or control rights of a public nature, such as navigation, fishery, or precious metals, but in its ordinary use it is confined to the right to take private property for public use."

"SECTION 2. The power of eminent domain being inherent in sovereignty is vested in the people and its exercise necessitating a legislative act is subject to the control of the General Assembly. This was recognized by our earliest constitution, which contained a provision as follows: 'That every member of society hath a right to be protected in the enjoyment of life, liberty and property, and therefore is bound to contribute his proportion toward the expense of that protection, and yield his personal service when necessary, or an equivalent thereto; but no part of a man's property can be justly taken from him, or applied to public uses, without his own consent, or that of his legal representatives.' In the Constitution of 1790 it was provided: 'Nor shall any man's property be taken or applied to public use without the consent of his representatives, and without just compensation

being made.' These provisions proved to be inadequate to fully protect the rights of individuals, and they were accordingly considerably enlarged, both by the amendments adopted in 1838, and by the Constitution of 1873. The latter contains three separate clauses relating to this subject: The first was designed to protect the individual from having his property taken without proper compensation being made; the second, to prevent the abridgment of the right of eminent domain, either by legislative action or by decisions of the Courts, and the third, to enlarge the liability of corporations invested with the power of eminent domain and to compel them to render more adequate compensation to the citizens. These provisions are as follows: 'Nor shall private property be taken or applied to public use without authority of law, and without just compensation being first made or secured.' 'The exercise of the right of eminent domain shall never be abridged or so construed as to prevent the General Assembly from taking the property and franchises of incorporated companies and subjecting them to public use, the same as the property of individuals.' 'Municipal and other corporations and individuals invested with the privilege of taking private property for public use shall make just compensation for property taken, injured, or destroyed by the construction or enlargement of their works, highways, or improvements, which compensation shall be paid or secured before such taking, injury, or destruction. The General Assembly is hereby prohibited from depriving any person of an appeal from any preliminary assessment of damages against any such corporations or individuals made by viewers or otherwise; and the amount of such damages in all cases of appeal shall, on the demand of either party, be determined by a jury according to the course of the common law.'

"SECTION 3. It has already been noticed that **the power of eminent domain cannot be bargained away, because its continued exercise is necessary to the existence of the state. The constitutional provision quoted above that 'the exercise of the right of eminent domain shall never be abridged' was therefore merely declaratory of existing law in this regard."**

And, in Chapter VIII, page 144, as follows:

" The power of eminent domain or the power to take private property for public use is one quite as essential to the existence of the state as the taxing power. Our courts have gone even further in protecting it, for it has been decided that the power of eminent domain cannot be bargained away. It follows that no matter what may be the terms of the agreement between the parties, the bargainee cannot claim to hold property exempted from liability to be taken by the state, for being supposed to know the law, he must be deemed to have been cognizant of the lack of power of the Legislature to make such a contract. In such a case, therefore, the constitutional prohibition of laws impairing the obligation of contracts has no application."

The Pennsylvania Constitution of 1790 contained the following provision (Section 10, page 197, of Ray's Constitutions of Pennsylvania):—

"No person shall, for the same offense, be twice put in jeopardy of life or limb; nor shall any man's property be taken or applied to public use without the consent of his representatives, and without just compensation being made."

This was copied verbatim in the Constitution of 1838, being in that Constitution Section 10 of Article IX "Declaration of Rights."

JUDICIAL CONSTRUCTION OF PENNSYLVANIA CONSTITUTION.

This article was construed in 1840 in the case of Harvey *vs.* Thomas, 10 Watts (Pa.) 63, holding constitutional the Act of May 5th, 1832 authorizing the location and construction of lateral railroads connecting with the public improvements and prescribing the mode of obtaining the same. Chief Justice Gibson said, *inter alia:*—

> "The most material point in the cause is that which involves the constitutionality of the statute on which the defendant's right is founded; but it is one about which little need be said. * * * *The clause by which it is declared that no man's property shall be taken or applied to public use, without the consent of his representatives, and without just compensation made, is a disabling, not an enabling one;* **and the right would have existed in full force without it."**

This case was quoted with approval in, *In re* Towanda Bridge Co., 91 Pa. 216 (1879), which held:—

> "The right of eminent domain extends to corporate franchises, and by virtue of that right the bridge of a corporation can be taken for public use and made a free bridge."

The opinion of Elwell, P. J., of the lower Court which was affirmed by the Supreme Court in a *per curiam* decision, set forth, *inter alia:*—

> "The Act of 1st May 1876, Purd. Dig. 2074, under which these proceedings were instituted, in express terms, provides a mode by which a bridge erected by a company may, upon compensation being made, be taken from the company and made free for the passage of the public. By Sect. 3, Art. 16, of the constitution of 1874, it is declared,

that 'the exercise of the right of eminent domain shall never be abridged or so construed as to prevent the General Assembly from taking property and franchises of incorporated companies, and subjecting them to public use the same as the property of individuals.'"

"The Constitution of 1838 provided that 'no man's property shall be taken or applied to public use without the consent of his representatives, and without just compensation being made.' In Harvey *vs.* Thomas, 10 Watts 66, it was said, per Gibson, C. J., that this clause is a disabling, not an enabling one, and that the right to take property for public use would have existed without it. **This right of eminent domain is inherent in all governments, and requires no constitutional provision to give it force: Taylor vs. Porter, 4 Hill 143. Its existence and force, are however, clearly implied and acknowledged, in the portions of the constitution above quoted. It is the rightful authority which exists in every sovereignty to control and regulate those rights of a public nature, which pertain to the citizens in common, and to appropriate and control individual property for the public benefit, as the public safety, necessity, convenience or welfare may demand: 2 Kent Com. 338-40; Cooley's Const. Lim. 662, and cases cited in note. Every species of property which the public needs may require, and which government cannot lawfully appropriate under any other right, is subject to be seized and appropriated under this right. Lands for public ways, buildings standing in the way of public improvements, or which for any other reason it becomes necessary to take or remove or destroy for public good; streams of water; corporate franchises and generally legal and equitable rights of every description, are liable to be thus appropriated: Id. 654, and authorities there cited.**

"Property in a franchise is no more sacred than private property in land, under a patent: Commonwealth *vs.* Pennsylvania Canal Co., 16 P. F. S. 41. Each species of property may be said to be held under a contract with the State, and yet it has never been doubted that land thus held may be taken for public use."

In affirming the above the Pennsylvania Supreme Court said *inter alia:*—

"That the right of eminent domain extends to corporate franchises, and that by virtue of that right the bridge of a corporation can be taken for public use and made a free bridge. *We think the position no longer open to controversy.*"

"The franchises" (of corporations) "are undoubtedly still within the right of eminent domain of the State and may be resumed or taken under the limitation of Art. IX., Sect. 10, of the Constitution 'nor shall any man's property be taken or applied to public use without the consent of his representatives, and without just compensation being made.'" Judge Sharswood (1870), delivering the opinion of the Pennsylvania Supreme Court in Commonwealth *vs.* Pennsylvania Canal Co., 66 Pa. on page 57.

OTHER PENNSYLVANIA CASES.

In re OPENING OF TWENTY-SECOND STREET, 102 PA. 108, decided in 1883. This was a proceeding instituted to open a street (as is the one involved in the case at bar) under the provisions of the Act of June 8th, 1881 (P. L. 68) providing as follows:—

"The municipal authorities and Courts having jurisdiction in any city of this Commonwealth, shall have exclusive control and direction of the opening, widening, narrowing, vacating and chang-

ing of grades of all streets, alleys and highways within the limits of such city, and may open or widen streets at such points, and of such width as may be deemed necessary by such city authorities and Courts, *any private or special statute to the contrary notwithstanding;* proceedings to be had in such cases as are now required by law."

In delivering the opinion of the Supreme Court Mr. Justice Paxson said:—

"By Act passed March 20th, 1849 (P. L. 194) it was enacted that 'No street, road, lane or alley shall be hereafter opened through the land of the United American Mechanics and Daughters of America Cemetery or burial place, except with the consent of said corporation, nor shall the same be liable to be taken or used for any object not connected with or appertaining to burial purposes, and shall be exempt from taxation, &c.'

"This Act was formally accepted by the cemetery company, and it was urged that it thus became a contract with the State; that the aforesaid Act of 1881 was inoperative for the reason that it conflicts with Section 10, Article I of the Constitution of the United States, which prohibits any State passing a law impairing the obligation of a contract.

"But the learned and able Judge of the Court below shows with great clearness **that a contract, even if there be a contract in this case, is property, and is not more sacred than any other species of property; that 'its obligation is not impaired but it is recognized when compensation is provided for its infringement.'** A franchise may be taken or destroyed in the exercise of the right of eminent domain by the Commonwealth as well as any other property. *In re* Towanda Bridge Company, 10 Norris 216. The careful consideration to this question by the Court below renders a further

discussion of it unnecessary. The reasons given and the authorities cited in the opinion of the learned Judge fully vindicate his judgment.

"The proceedings are affirmed."

The opinion of the Court below, 15 Philadelphia 409, was delivered by Judge Thayer, who, after reciting the Act of 1881 went on to say:

"It was insisted, and very ably argued by the counsel for the cemetery company, that the Act of 1849 and the acceptance of that Act constituted a contract between the State and the company, and that the abrogation of that Act is a breach of the contract against which the company is protected by the Constitution of the United States, Art. I, Sec. 10. **Conceding for the sake of the argument that the Act of 1849 when accepted by the company constituted a contract, it is nevertheless certain that contracts like every other species of property, are subject to the right of eminent domain existing in the several States and must give way before it, and that the exercise of this power is not in conflict with Art. I, Sec. 10 of the Constitution:** West River Bridge Company *vs.* Dix, 6 Howard 507; Rundle *vs.* Delaware and Raritan Canal Co., 14 *Ib.* 80; Fletcher *vs.* Peck, 6 Cranch. 87. **It is incident to the sovereignty of every government that it may take private property for public use. Of the necessity and expediency of this taking the government must judge, and the only limitations to which this power is subject are that the taking must be for public use and with the concomitant obligation to make just compensation for the property taken: Smedley vs. Erwin, 1 P. F. Smith, 445. Property and contracts of all kinds must yield to this demand of the sovereign, for all persons hold their property subject to requisition for the public service.** * * * It is now well settled that there is no distinction between corporeal and incorporeal property in this

respect, and a franchise may be taken or destroyed in the exercise of this right as well as any other property. A contract is property, but is no more sacred than other property. Its obligation is not impaired, but is recognized, when compensation is provided for its infringement."

This, it will be observed, was said with reference to a contract substantially identical with that here in question, and of the taking of a strip through the grounds for a highway, and not the taking of the entire cemetery, or any other part of it.

COM. *vs.* RAPID TRANSIT ST. RY. CO., 219 PA. 11.

In Commonwealth *vs.* Rapid Transit Street Railway Co., 219 Pa. 11, the right of the defendant to construct a surface railway on Broad Street in the City of Philadelphia, under the provisions of the Act of Assembly of June 7th, 1901 (P. L. 514), *a general law opening to occupation by new corporations streets not already actually occupied, in spite of contractual or statutory provisions to the contrary, on due compensation being made*, was challenged upon the ground, among others, that the Thirteenth and Fifteenth Street Railway Company had at one time claimed a franchise to lay tracks on Broad Street and had made a settlement of the claim which resulted in the passage of the Act of March 26th, 1873 (P. L. 435), by which the railway company was authorized to surrender its rights on Broad Street, and "in consideration of such surrender no franchise or privilege to construct a track or tracks or any artificial tramway, for the conveyance of passengers for hire, upon any portion of said Broad Street, or upon Thirteenth or Fifteenth Streets, or other of said company's connection, or to run any cars upon any part of said route, shall be hereafter granted to any person or persons or body politic." The company made the surrender by formal agreement with the State lodged with the Secretary of the Commonwealth.

A new company was afterwards incorporated under the general law of 1901 for the purpose of constructing a surface railway on Broad Street, *and having the power of eminent domain*. It was ruled:—

> "The Act of March 23d, 1866, P. L. 299, prohibiting the laying of any railroad or railway tracks on Broad Street in the City of Philadelphia, and the Act of March 27th, 1873, P. L. 435, which provided that in consideration of the surrender by the Thirteenth and Fifteenth Streets Railway Company of its claim on Broad Street, no franchise should be granted thereafter to any street railway company to lay tracks on Broad Street, or upon Thirteenth or Fifteenth Streets, was repealed by the Act of June 7th, 1901, P. L. 514, **as the Legislature could not grant away the State's right of eminent domain so as to bind future Legislatures."**

The Supreme Court in that case held as follows (Mr. Chief Justice Mitchell delivering the opinion):—

> "In addition to the argument of the Commonwealth as to the intent and constitutionality of the Act of 1901, it is now argued for the railway company that the Act of 1873 was a contract with the State which cannot be abrogated. *But it is conceded that one Legislature cannot grant away the State's right of eminent domain so as to bind future Legislatures. In re* Opening of Twenty-second Street, 102 Pa. 108."

The principles established in the foregoing cases, we submit, are controlling in the cases now under consideration.

Attention is called to the similarity between the Act of May 20th, 1849, P. L. 194, providing that:—

> "No street, road, lane or alley shall be hereafter opened through the land of the United American Mechanics and Daughters of America Cemetery or burial place, except with the consent of said cor-

poration, nor shall the same be liable to be taken or used for any object not connected with or appertaining to burial purposes, and shall be exempt from taxation," considered "*In re* Twenty-second Street," and the Act of April 17th, 1854, which is now before the Court, and which provides:

"That no streets, alleys, roads or lanes, shall ever be opened through the property belonging to the corporation of the contributors of the Pennsylvania Hospital, situate in the Twenty-fourth Ward of the City of Philadelphia, without the consent of the said corporation, so long as the said property is used for the purposes of their insane department, any law to the contrary notwithstanding: *Provided*, that said corporation shall contribute one-half the ground, for an avenue on their east, one on their west line, each one hundred feet in width, without charge to the City and County of Philadelphia."

In LOCK HAVEN BRIDGE CO. *vs.* CLINTON COUNTY, 157 PA. 379 (1893), it was decided that:—

"A provision in the charter of a bridge company by which the legislature reserves the right to purchase the bridge after the expiration of twenty years by paying to the company 'a sum of money, which, together with the dividends declared, shall equal the cost of constructing said bridge and ten per centum per annum interest thereon,' does not imply a relinquishment by the legislature of any right by which the property of the company may be taken for public use. **The power of eminent domain is one of the essential incidents of sovereignty, and one legislature cannot contract with a corporation that its property shall not be taken by the exercise of eminent domain."**

Mr. Chief Justice Sterrett delivered the opinion of the Court, saying *inter alia*:—

"It was strenuously contended that under Section 13 of the Act of 1850, incorporating plaintiff company,

the proposed testimony, embraced in the offers recited in the first two specifications, was both competent and relevant. That section provides as follows: 'At any time after the expiration of twenty years from the time of completing said bridge, it shall be lawful for the Commonwealth to purchase the same by paying to the said company a sum of money, which, together with the dividends declared, shall equal the cost of constructing said bridge and ten per centum per annum interest thereon.' It is claimed that this provision has all the force and effect of a contract between the company and the Commonwealth, and furnishes the only measure of the damages or compensation to which the company is entitled for its bridge property and franchise, whether the same be taken for public use under the right of eminent domain, or purchased by the Commonwealth in the manner above specified.

"The very able and ingenious argument of learned counsel, in support of this position, has failed to convince us that the legislature ever intended to thus surrender or barter away the right of eminent domain and substitute in lieu thereof the provision above quoted. **In the first place, it was powerless to do so;** but, assuming, for argument sake, that it possessed the power, it did not attempt to exercise it. * * *

"In Backus *vs.* Lebanon, *supra* (11 N. H. 19), Mr. Chief Justice Parker said: 'Nor does the provision of the charter by which the legislature reserved the right to purchase the property with the consent of the corporation (given through their acceptance of the charter), prove, by any means, that the right of eminent domain was thereby surrendered; even if the legislature might be supposed to possess the power to make such surrender.' * * *

"But aside from the absence of anything like an express or even an implied intention, on the part of the General Assembly of 1850, to surrender the

right of eminent domain even for the term of twenty years, **it lacked the power to thus deprive any subsequent legislature of the right to authorize the taking of the bridge property for a higher public use. * * * 'The power of eminent domain is one of the essential incidents of sovereignty, and one legislature cannot contract with a corporation that its property shall not be taken by the exercise of eminent domain. Such provision has no binding force upon a subsequent legislature. There is no such thing as an extinction of the right of eminent domain:'** Mills Em. Domain, Sec. 40; 6 Am. & Eng. Enc. Law, 533, 535; Hyde Park *vs.* Oakland Cemetery Association, 119 Ill. 141."

CASES IN THIS COURT.

CINCINNATI [illegible] & N. R. R. Co., 223 U. S. 390.

The principles of law involved in the present case have been the subject of very considerable discussion in this Court. Perhaps the latest case upon the subject is that of the CITY OF CINCINNATI *vs.* LOUISVILLE AND NASHVILLE RAILROAD COMPANY, 223 U. S. 390 (decided in 1912), which held that:—

"A dedication of land as a common for use and benefit of the town forever as shown on a plan, and the acceptance by the town and sale of lots under the plan constitutes a contract the obligation whereof is protected by the contract clause of the Federal Constitution.

"The right of every State to exercise the power of eminent domain as to every description of property is an inherent power without which it cannot perform its functions.

"The power of eminent domain was not surrendered by the States to the United States or affected by the Federal Constitution except that it must be exercised with due process of law and on compensation being made.

"The power of eminent domain extends to tangibles and intangibles, including choses in action, contracts and charters.

" An appropriation under eminent domain with compensation of a contract neither challenges its validity nor impairs the obligation. It is a taking, not an impairment, of its obligation.

" Every contract, whether between the State and an individual or between individuals only, is subject to the law of eminent domain, for there enters into every engagement the unwritten condition that it is subject to appropriation for public use."

Mr. Justice Lurton in delivering the opinion of the Court said, among other things:—

" The constitutional inhibition upon any State law impairing the obligation of contracts is not a limitation upon the power of eminent domain. The obligation of a contract is not impaired when it is appropriated to a public use and compensation made therefor. Such an exertion of power neither challenges its validity nor impairs its obligation. Both are recognized, for it is appropriated as an existing enforceable contract. It is a taking, not an impairment of its obligation. If compensation be made, no constitutional right is violated. All of this has been so long settled as to need only the citation of some of the many cases. Charles River Bridge vs. Warren Bridge, 11 Pet. 420; The West River Bridge Co. vs. Dix, 6 How. 507, N. O. Gas Co. vs. La. Light Co., 115 U. S. 650; Long Island Water Supply Co. vs. Brooklyn, 166 U. S. 685; Offield vs. Railroad Co., 203 U. S. 372.

" Every contract, whether between the State and an individual or between individuals only, is subject to this general law. There enters into every engagement the unwritten condition that it is subordinate

to the right of appropriation to a public use. The West River Bridge Co. vs. Dix, 6 How. 507; Long Island Water Supply Co. vs. Brooklyn, 166 U. S. 691-2."

The case of CHARLES RIVER BRIDGE *vs.* WARREN BRIDGE, 11 Peters 420 held: —

> "A state law may be retrospective and divest vested rights, and yet not violate the constitution of the United States.
>
> "A ferry existed by law, and its profits belonged to Harvard College; the State created a corporation, empowered it to build a bridge at the site of the ferry, and to take tolls; it was required to pay, and did pay, to the college an annual compensation for the tolls which the latter might have received from the ferry. HELD, that the ferry right, and all franchises connected therewith, were extinguished, not transferred to the bridge corporation. * * *
>
> "The charter of the bridge corporation not containing any express contract that the State would not authorize another bridge to be built to the injury of the corporation. HELD, that no such contract could be implied, and that a law empowering another corporation to erect and maintain a free bridge, so near to the first as practically to deprive the first corporation of all tolls, was not a law impairing the obligation of any contract."

The opinion of the Court was delivered by Chief Justice Taney, in which opinion, however, the majority of the Court holding that the charter of the Bridge Company did not contain any express contract, there was practically no discussion of the question of Eminent Domain; but in the dissenting opinions filed by Mr. Justice McLean and Mr. Justice Story there was a great deal said upon this point, these Judges holding that there was a valuable

consideration for the charter issued by the Legislature of Massachusetts to the Bridge Corporation, which constituted a contract. Justice McLean said, among other things, on page 567:—

> "The 10th article of the declaration of rights in the constitution of Massachusetts, provides: 'Whenever the public exigencies require that the property of any individual should be appropriated to public uses, he shall receive a reasonable compensation therefor.' And in the 12th article it is declared, that, 'no subject shall be deprived of his property immunities, privileges, or estate, but by the judgment of his peers or the law of the land.' Here is a power recognized in the sovereignty, and is incident to it, to apply private property to public uses by making for it a just compensation. **This power overreaches every other, and must be exercised at the discretion of the government; and a bridge, a turnpike road, a tract of land, or any other property, may be taken in whole, or in part, for public purposes, on the condition of making compensation.**"

And on page 569 Justice McLean went on to say:

> "Acts of incorporation, when granted on a valuable consideration, assume the nature of contracts, and vested rights under them are no more subject to the legislative power than any other vested rights. In granting the charter to the Charles River Bridge Company, the legislature did not divest itself of the power to grant similar charters. But the thing granted passed to the grantee, and can no more be resumed by the legislature, than it can resume the right to a tract of land which has been granted. When land is granted, the State can exercise no acts of ownership over it, unless it be taken for public use, and the same rule applies to a grant for a bridge, a turnpike road, or any other public improvement."

And on page 570:—

"There can be no doubt that a compensation should be provided for in the same act which authorizes the appropriation of the property, or in a contemporaneous act. If, however, this be omitted, and the property be taken, the law unquestionably gives a remedy adequate to the damages sustained. No government which rests upon the basis of fixed laws, whatever form it may have assumed, or wherever the sovereignty may reside, has asserted the right, or exercised the power of appropriating private property to public purposes, without making the compensation. * * *

"But was the complainants' property appropriated under the charter granted to the respondents, for public purposes? If the new bridge were deemed necessary by the legislature, to promote the general convenience, and the defendants were consequently authorized to construct it, and a part of the plaintiff's franchise were granted to the defendants, it was an appropriation of private property for public use. It was as much an appropriation of private property for public use, as would have been an appropriation of the ground of an individual for a turnpike or a railroad authorized by law. * * *"

Mr. Justice Story, in his dissenting opinion, said, among other things (page 598):—

"It is confessedly a case of contract, and not of bounty; a case of contract for a valuable consideration; for objects of public utility; to encourage enterprise; to advance the public convenience; and to secure a just remuneration for large outlays of private capital."

(Page 638):—

"If the public exigencies and interests require that the franchise of Charles River Bridge should

be taken away, or impaired; it may be lawfully done upon making due compensation to the proprietors. * * * and this franchise is property, is fixed, determined property."

(Page 641):—

"It has been further argued, that, even if the charter of the Charles River Bridge does imply such a contract on the part of the legislature as is contended for, it is void for want of authority in the legislature to make it; because it is a surrender of the right of eminent domain, intrusted to the legislature and its successors for the benefit of the public, which it is not at liberty to alienate. If the argument means no more than that the legislature, being intrusted with the power to grant franchises, cannot, by contract, agree to surrender or part with this power, generally, it would be unnecessary to consider the argument, **for no one supposes that the legislature can rightfully surrender its legislative power. If the argument means no more than that the legislature, having the right by the Constitution to take private property (among which property are franchises) for public purposes, cannot divest itself of such a right by contract, there would be as little reason to contest it."**

(Page 644):—

"The grant of the franchise of a bridge, twenty feet wide, to be exclusive within those limits, is certainly, if obligatory, an abridgment of surrender of the sovereign power to grant another bridge within the same limits; if we mean to say that every grant that diminishes the things upon which that power can rightfully act is such an abridgment. Yet the argument admits, that within the limits and planks of the bridge itself, the grant is exclusive, and cannot be recalled. *There is no doubt that there is a*

necessary exception in every such grant, that if it is wanted for public use, it may be taken by the sovereign power for such use, upon making compensation. Such a taking is not a violation of the contract; but it is strictly an exception resulting from the nature and attributes of sovereignty; implied from the very terms, or at least acting upon the subject-matter of the grant, suo jure.

"But the legislature of Massachusetts is, as I have already said, in no just sense the sovereign of the State. The sovereignty belongs to the people of the State in their original character as an independent community; and the legislature possesses those attributes of sovereignty, and those only, which have been delegated to it by the people of the State, under its Constitution."

WEST RIVER BRIDGE CO. *vs.* DIX, 6 HOWARD 507.

This case was followed by the West River Bridge Company *vs.* Dix, 6 Howard, page 507. That case held:—

"A bridge, erected and owned by a private corporation, and held for the purpose of exercising the franchise granted by its charter, to take toll for passing the same, may be taken and laid out as a part of a public highway, under a general law of the State, authorizing the act, compensation being adjusted and made to the corporation in the same manner as to natural persons for taking their property; and such a law, so applied, does not impair the obligation of any contract."

The opinion of the Court was delivered by Justice Daniel, who said (page 532):—

"Under every established government, the tenure of property is derived mediately or immediately from the sovereign power of the political body, organized in such mode or exerted in such way as

the community or State may have thought proper to ordain. It can rest on no other foundation, can have no other guarantee. It is owing to these characteristics only, in the original nature of tenure, that appeals can be made to the laws either for the protection or assertion of the rights of property. Upon any other hypothesis, the law of property would be simply the law of force. Now it is undeniable, that the investment of property in the citizen by the government, whether made for a pecuniary consideration or founded on conditions of civil or political duty, is a contract between the State, or the government acting as its agent, and the grantee; and both the parties thereto are bound in good faith to fulfil it. But into all contracts, whether made between States and individuals, or between individuals only, there enter conditions which arise not out of the literal terms of the contract itself; they are superinduced by the pre-existing and higher authority of the laws of nature, of nations, or of the community to which the parties belong; they are always presumed, and must be presumed, to be known and recognized by all, are binding upon all, *and need never, therefore, be carried into express stipulation, for this could add nothing to their force.* Every contract is made in subordination to them, and must yield to their control, as conditions inherent and paramount, wherever a necessity for their execution shall occur. Such a condition is the right of eminent domain. **This right does not operate to impair the contract affected by it, but recognizes its obligation** in the fullest extent, claiming only the fulfilment of an essential and inseparable condition. Thus, in claiming the resumption or qualification of an investiture, it insists merely on the true nature and character of the right invested. The impairing of contracts inhibited by the constitution can scarcely, by the greatest violence of construction, be made applicable

to the enforcing of the terms or necessary import of a contract; the language and meaning of the inhibition were designed to embrace proceedings attempting the interpolation of some new term or condition foreign to the original agreement, and therefore inconsistent with and violative thereof. **It then being clear that the power in question not being within the purview of the restriction imposed by the 10th section of the first article of the constitution, it remains with the States to the full extent in which it inheres in every sovereign government, to be exercised by them in that degree that shall by them be deemed commensurate with public necessity.** * * *

"A distinction has been attempted, in argument, between the power of a government to appropriate for public uses property which is corporeal, or may be said to be in being, and the like power in the government to resume or extinguish a franchise. The distinction, thus attempted, we regard as a refinement which has no foundation in reason, and one that, in truth, avoids the true legal or constitutional question in these causes; namely, that of the right in private persons, in the use or enjoyment of their private property, to control and actually to prohibit the power and duty of the government to advance and protect the general good. We are aware of nothing peculiar to a franchise which can class it higher, or render it more sacred than other property."

These cases have been followed by a multitude of others, some of which were quoted in Mr. Justice Lurton's opinion (*supra*, page 26), but we believe it unnecessary to further elaborate the principles thus established, except to refer to a few cases from States other than Pennsylvania, as follows:—

CASES FROM OTHER STATES.

BRIMMER *vs.* BOSTON, 102 MASS. 19.

An illustrative case is that of Brimmer *vs.* Boston, 102 Mass. 19, in which the city of Boston undertook to lay out a public highway or highways over property which it itself had by specific agreement guaranteed to certain parties for use for wharf purposes absolutely free from the power to lay out streets or highways over it and that such parties should have peaceful, quiet and undisturbed enjoyment of the site. It was held that such previous agreement was no bar to the condemnation and use of the property in question which was needed for a street, the Massachusetts Supreme Court saying (page 22):—

> "The laying out, establishing and constructing the way is the act of the State, in the exercise of the right of eminent domain. This sovereign power of appropriating private property for public uses cannot be destroyed or abridged by the acts of any individual or corporation. It is obvious, therefore, that the stipulations and covenants of the city of Boston, contained in the indentures executed in 1880, whatever may be their construction or character, cannot operate to defeat or abridge the power of the public to appropriate the dock of the plaintiffs, or any part of it, to public uses as a highway. If they are to be construed as claimed by the plaintiffs, they cannot have the effect to defeat the rights of the public, or to excuse the city from its duty to construct the way.
>
> "The plaintiffs hold their estate subject to the liability, which attaches to the property of every individual in the community, to be taken and appropriated for a public use; and the fact that they hold it under a covenant of quiet enjoyment, entered into by the city of Boston in its capacity as municipal corporation, cannot create in their favor an exemption from this common liability."

In HYDE PARK *vs.* CEMETERY ASSOCIATION, 119 ILL. 141, a statute of the State of Illinois chartering a cemetery association provided that "no road, street, alley or thoroughfare shall be laid out or opened through its ground or any part thereof" without the consent of the directors, and the question afterwards arose as to the effect of this language to prevent the condemnation of land through the cemetery for a public highway, and thereupon the Court of highest resort of that State expressed its view in the following terms (pages 148-9):—

> "The right of eminent domain is an element of sovereignty, and a contract in restraint of a free exercise of this right is not obligatory on the State, and does not fall within the inhibition of the Constitution of the United States. **Cooley, in his work on Constitutional Limitations (3d Ed.), page 525, in the discussion of this question says: 'Any legislative bargain in restraint of the complete continuous and repeated exercise of the right of eminent domain, is unwarranted and void; and that provision of the Constitution of the United States which forbids the State violating the obligation of contracts, could not be so construed as to render valid and effectual such a bargain which originally was in excess of proper authority.'** See also, p. 343; Railroad Co. *vs.* Railroad Co., 97 Ill. 506; West River Bridge Co. *vs.* Dix, 6 How. 531.
>
> "There are cases where the State might bind itself, and where it would be powerless, under the provision of the Constitution cited, to pass future laws relieving itself of assumed obligations; but this is not one of them. **The State had no power to divest itself of the right of eminent domain, by any act it might pass which would prevent the exercise of that right in the future, when, in the opinion of the Legislature, a case arose wherein the public interest demanded the exercise of the power."**

In the matter of the OPENING OF FIRST STREET, 66 MICH. 42, upon the question of the right of a municipality to condemn and open streets under its power of eminent domain in derogation of its own contract not to do so, the Court in the course of a lengthy discussion of the subject, said (page 53):—

> "The powers of a municipal corporation in respect to opening, improving, and controlling its streets are held in trust for the public benefit, and cannot be surrendered by contract to private persons, or to a corporation, by resolution of the common council, or in any other manner. If this could be done, there is no reason why the common council of any year may not, by contract, preclude the City for all future time from opening, widening, or extending any of its streets, or laying new streets, no matter how great the public necessity may be therefor. Dill. Mun. Corp., sec. 567; Davis *vs.* Mayor, 14 N. Y. 506, 532; People's R. R. *vs.* Memphis R. R., 10 Wall. 38."

This was further elaborated at considerable length. The view of the Court upon this question is epitomized in the third, fourth and fifth syllabi.

That this incapacity to alienate the power of eminent domain is not due to limitations upon municipal action, as distinct from those attaching to the State Legislatures, as contended by plaintiffs-in-error, is apparent from the entire scope of the foregoing decisions.

It is clear that the legislature of Pennsylvania could not rightfully surrender this legislative power (Mr. Justice Story on pages 30, 31 of this Brief) and, moreover, that

> **"The constitutional inhibition upon any State law impairing the obligation of contracts is not a limitation upon the power of eminent domain. The obligation of a contract is not impaired when it is appropriated to a public use and compensation made therefor. Such an exertion of power neither challenges its validity nor impairs its obligation.**

Both are recognized, for it is appropriated as an existing enforceable contract. It is a taking, not an impairment of its obligation. If compensation be made, no constitutional right is violated. All of this has been so long settled as to need only the citation of some of the many cases. * * *

"Every contract, whether between the State and an individual or between individuals only, is subject to this general law. There enters into every engagement the unwritten condition that it is subordinate to the right of appropriation to a public use." Mr. Justice Lurton on page 26 of this Brief.

In the case of KENNEBEC WATER DISTRICT *vs.* WATERVILLE, 96 MAINE 234, an exclusive franchise had been granted to supply water to certain municipalities in Maine. Afterwards, a water company was chartered with the power of eminent domain and the right to take over by procedure thereunder the franchises thus earlier conferred; and it was held proper that this should be done, the claim to compensation under the exercise of the power of eminent domain being regarded as sufficient to justify the abrogation of the earlier franchise. The opinion of the Supreme Judicial Court of Maine, rendered in 1902, is most instructive. It discusses every phase of the subject, cites very freely from earlier decisions and from the text writers, and, among other apposite language, uses the following (pages 242 and 43):—

"The power of eminent domain is not created by constitution or statute. It is an inherent attribute of sovereignty. It existed in the sovereign long before the adoption of any constitution. The article in our bill of rights (Article 1, Section 21) declaring that 'private property shall not be taken for public uses without just compensation; nor unless public exigencies require it;' does not confer the power, but by implication recognizes it as existing in the state.

"The sovereign power of the state, by which is meant the people of the state in their sovereign capacity, acting through their representatives, the legislature, possesses and has the right to exercise the great power of eminent domain over all the private property and property rights within the limits of the state, of whatever nature, corporeal or incorporeal, and by whomsoever owned,—whether by individuals or corporations. The property of a corporation is not exempt from the exercise of this power, even though it may have been granted exclusive franchises and privileges. **A legislature, in granting a charter, cannot, even by express terms, however strong may be the language used, preclude another legislature, or even itself, from exercising the sovereign power of eminent domain over the charter thus granted, and the property and rights acquired thereunder. The legislature cannot barter away the sovereign power of the state. All grants by the state, whether of property or rights of franchises, are subject to this power."**

THE ISSUE DEFINED.

The learned counsel for the plaintiff in error say on page 11 of their Brief, that "the single and plain issue is whether in 1854 the Legislature of Pennsylvania had power to make the contract upon which the plaintiff relies."

This does not fully state the issue. We deny that the Legislature had the power, and assert that, even if it had, the State may still take the land—all of it or any part of it—and if in taking the land, if incidentally or even directly, the contract is affected, the contract is not impaired, by proceedings under the power of eminent domain; that the contract itself, and any contract, may be so taken upon compensation being duly made.

It is, of course, admitted there was a valuable consideration for the "covenant" by the State, but the state-

ment made in the brief of the plaintiff in error that "assuming that such damages were to be awarded, no fair measure of them could be ascertained" is entirely unwarranted.

On page 13 of their Brief, they further state: "The Pennsylvania Constitution of 1838, which was in force at the time the Act of 1854 was passed, delegated the whole legislative authority of the State to the Legislature, saving and excepting certain matters which were reserved to the people. *None of these reservations at all touches the power to make a contract like that in question.*"

This is clear error. In the first place, the right of eminent domain is extra-constitutional; and, moreover, the Constitution of 1838 provided (see page 118 of Brief of plaintiff in error): "Nor shall any man's property be taken or applied to public use without the consent of his representatives and without just compensation being made."

And the Constitution of 1874 provides (see page 121 of the Brief of plaintiff in error): "The exercise of the right of eminent domain shall never be abridged or so construed as to prevent the General Assembly from taking the property and franchises of incorporated companies and subjecting them to public use, the same as the property of individuals."

As has already been shown, this provision of the Constitution of 1874 was but declaratory of existing law, and both these provisions mean the same thing. They are restrictions upon the Legislature, forbidding it to bind itself or succeeding Legislatures, and by no stretch of the imagination may they be construed as a privilege or a power in a Legislature to *surrender the power of eminent domain.*

It is idle to say that this contract does not constitute a surrender of the power of eminent domain. The fact that it is stated to be "limited in its operation" does not affect the legal proposition involved. And the admission that "it leaves the property of the plaintiff subject to be taken as a whole for any public use" disposes of the issue.

If the whole may be taken, why not a part? The argument of the plaintiff from beginning to end presumes that the *part* is greater than the *whole*. The interest of the Hospital in the land is a fee simple. Chancellor Kent says in Book 2 of his Commentaries, Lecture 54, * page 5, with regard to a fee simple: "No person is capable of having a greater estate or interest in land." It is admitted the fee may be taken, but it is claimed this "covenant" may not be. As a matter of fact, it is the land which is made the subject of the eminent domain proceedings, for it is an easement in the needed strip that is proposed to be sequestered. The contract falls with the land.

The learned counsel further state that this Court has never said that the power to exercise the right of eminent domain may not be restrained by contract. We assert that this Court has many times said that very thing with reference to the section of the Constitution of the United States which is under consideration, and we again refer to the opinion of Mr. Justice Daniel in West River Bridge Co. *vs.* Dix, 6 Howard, 507:—

> "It then, being clear that the power in question not being within the purview of the restriction imposed by the tenth section of the first article of the Constitution, it remains with the States."

These words answer the above assertion and likewise the argument made on page 52 of plaintiff's Brief, *i. e.*— "Here was no ease of contract by the State not to exercise the power" (referring to West River Bridge Co. *vs.* Dix).

It makes no difference whether there was such a contract or not, for "the power in question (eminent domain) is clearly "not within the restriction * * * it remains with the States."

The words in Mr. Justice Daniel's opinion immediately following, and quoted in bold faced type on page 50 of plaintiff's Brief, do not mean the States may not take a contract, for in that very case a contract was taken.

The language of Mr. Justice Lurton (pages 26-7 of this Brief) and of Mr. Justice Brewer (*infra* pages 45-48) in like manner make it clear that the state legislatures cannot bind themselves or their successors by any such contract; and the same view permeates all the decisions of this Court in which the question has arisen.

With the exception of the cases referred to under the heading of "Contracts in Respect of the Eminent Domain" set forth on pages 43 to 63 of the Brief of the plaintiff-in-error, there is none cited therein in support of its contention, which involves any question arising under the power of eminent domain.

CASES ON WHICH PLAINTIFF IN ERROR RELIES.

Under that heading are quoted four cases:—

CHARLES RIVER BRIDGE *vs.* WARREN BRIDGE, 11 PETERS, 420 (1837);

WEST RIVER BRIDGE CO. *vs.* DIX, 6 HOWARD, 507 (1848);

BRIDGE PROPRIETORS *vs.* HOBOKEN CO., 1 WALL. 116 (1863);

THE BINGHAMTON BRIDGE, 3 WALL. 51 (1865).

We have already referred to the first two, and we submit the plaintiff-in-error grievously errs if it endeavors to extract any consolation from them.

With regard to the other two—**these again are not eminent domain cases.**

Bridge Proprietors *vs.* Hoboken Co., 1 Wall. 116, was commented on at length by Mr. Justice Harlan in New Orleans Gas Co. *vs.* Louisiana Light Co., 115 U. S. on page 662, as was also The Binghamton Bridge Case. Each of these was concerned with an attempt to destroy franchises duly granted and accepted, without compensating those who had invested their money on the faith of the legislative grant.

There was no question of the exercise of the power of EMINENT DOMAIN *in either of these cases, for in neither was it proposed to make compensation for the loss of rights resting upon the respective contracts.*

How little bearing they have on a purely Eminent Domain case, like the present one, is readily apparent.

The plaintiff-in-error places great reliance upon Fletcher *vs.* Peck. That case is referable to the simple principle that the Courts will not countenance the setting aside of the title of an innocent holder of real estate for value and without actual or constructive notice of secret fraud, alleged to have been perpetrated by a prior holder in the acquisition of the property. The case is to be distinguished from the present one by the vital fact that it was proposed by the Legislature of the State of Georgia to take back the land without condemnation of it or payment for it, it being alleged that members of the Legislature which authorized the original sale had been bribed. So much appears from the opinion of Chief Justice Marshall (page 135) wherein he says:—

> "It may well be doubted whether the nature of society and of government does not prescribe some limits to the Legislature's power, and if they be prescribed where are they to be found, **if the property of an individual fairly and honestly acquired may be seized without compensation."**

This sentence is the keynote of the decision. It might justly be argued that the Commonwealth of Pennsylvania and the City of Philadelphia could not deprive appellant of its property without compensation if they had endeavored to do so.

In discussing the original Act authorizing the sale alleged to be a nullity, Chief Justice Marshall said:—

> "This solemn question cannot be brought collaterally and incidentally before the Court. It would be indecent in the extreme, upon a private contract between two individuals, to enter into an inquiry

> respecting the corruption of the sovereign powers of the State;"

and the Court held in the matter of this private litigation:—

> "If a Court of Law can in any case, inquire into the motives of members of the Legislature for voting for a law it cannot do so collaterally in a suit between individuals to which the State is not a party."

The Court further says:—

> "If the Legislature make a grant of lands in fee simple a subsequent Legislature cannot take away the title of a *bona fide* purchaser for a valuable consideration from the first grantee upon the ground that the grant to the latter was fraudulent."

We submit that the case of Fletcher *vs.* Peck has no true relation whatever to the case at bar.

ABSENCE OF AUTHORITIES SUPPORTING PLAINTIFF IN ERROR.

The counsel for the plaintiff in error in their voluminous brief quote many cases decided in this Court relating to questions of taxation, water rents, interference with the exclusive right to supply a city with water, assessments for paving, franchises authorizing the erection or exclusive maintenance of bridges, contracts in respect to public land, and a great variety of subjects which are unrelated to the one in hand. But not a single authority or any line or word cited by them, either from this or other tribunals, from the text writers, or from any source whatever, supports their contentions in this case.

They seek to distinguish on this or that unessential particular, the solid array of authorities which demolish their theories. They belittle and endeavor to minimize the innumerable decisions adverse to the positions which they assume.

Again and again has this Court, and have all other Courts by which these questions have been discussed, declared the principles that the right of eminent domain which resides in all sovereignties is superior to and independent of any constitutional grant; that that power is inalienable; that legislatures hold it as trustees for the entire Commonwealth, and like all other trustees are forbidden to part with the powers vested in them for the benefit of others, and the continued exercise of which is essential to their functions. All the authors who have dealt with this subject unite in supporting the doctrine that the power of eminent domain cannot be bartered away in whole or in part, no matter how express or how strong the language in which the attempt is made, or how direct and immediate the consideration may be; and that the legislative agents of the people act *ultra vires* whenever they try to part with that power; and every Federal or State Court, including this Court and those of substantially all the States, has held that when compensation is made for the taking of property, whether tangible or whether it arises out of a grant, a franchise, a contract, a covenant or any species of obligation whatever, so long as the taking is for a legitimate public use, by virtue of the power of eminent domain, it does not constitute an impairment of the contract or of other property rights; that, therefore, the National and the State constitutional provisions forbidding such impairment have no application. As has been shown above, writers, including Judge Cooley, Judge Dillon, whose work on Municipal Corporations has been an accepted authority for more than a generation, Judge Redfield (on the Law of Railways), Mr. Mills, Mr. Lewis, in their works on Eminent Domain, Mr. Greenleaf, Mr. Elliott in his book on Roads and Streets, and all other writers of text books, as well as the editors of the encyclopaedias and digests, without a single dissenting voice, proclaim the universality of these views. Nowhere is to be found a judicial or any other utterance to the contrary.

In this respect the case before the Court is almost unique. The task generally confronts counsel of reconciling opposing views; of showing that, in spite of differing decisions, the *weight* of authority is in his favor, or that his client's cause has the more persuasive inferences on its side. In this instance alone, at least so far as the experience of the writer has gone, the doctrines propounded by all the judges and all the writers are found to be at one.

THE CONTRACT RIGHTS AFFECTED ARE INCIDENTAL TO THE LAND.

Nor are the plaintiffs-in-error fortunate in the effort to which they are driven to distinguish between the taking of the entire tract, which they admit is permissible, and the taking of the strip of their land necessary for the bed of the street. The contract with the state, which is at the base of this litigation, is but an incident. The City of Philadelphia, finding a pressing necessity for a public highway through the grounds, institutes proceedings by virtue of the Act of 1881 under the power of eminent domain to take **so much of the land** as may be required for that purpose. The legislative grant of immunity is not the thing which the city desires primarily to appropriate, but the ground which plaintiff-in-error claims is protected by that grant. But the authorities are unanimous to the effect that the legislature is the sole judge of the quantity, the estate, the right, or the interest which is needed to be appropriated for the public good.

This is true *a fortioti* where tangible property is taken and the contract right falls with it, as this Court has decided in the case of LONG ISLAND WATER SUPPLY COMPANY *vs.* BROOKLYN, 166 U. S., PAGE 685. In that case it was said by Mr. Justice Brewer speaking for the Court:—

"Our inquiry must be directed to the question whether any rights of the water supply company secured by the Constitution of the United States have been violated. The contention of plaintiff-in-error is that the proceedings had under the statute which resulted in the judgment of condemnation violate section 10, article 1, of the Constitution of the United States, which forbids any State to pass a law impairing the obligation of contracts, and were not 'due process of law,' as required by the Fourteenth Amendment.

"With reference to the first part of this contention it is said that in 1881 the town of New Lots made a contract with the Water Supply Company by which for each and every year during the term of twenty-five years it covenanted to pay to the company so much per hydrant for hydrants furnished and supplied by it; that the act of annexation continued the burden of this obligation upon the territory within the limits of the town, although thereafter the town as a separate municipality ceased to exist, and the territory became simply a ward of the city of Brooklyn; that the condemnation proceedings destroyed this contract and released the territory from any obligation to pay the stipulated hydrant rental; that a State or municipality cannot do indirectly what it cannot do directly; that as the municipality could not by any direct act release itself from any of the obligations of its contract, it could not accomplish the same result by proceedings in condemnation. We cannot yield our assent to this contention. All private property is held subject to the demands of a public use. The constitutional guarantee of just compensation is not a limitation of the power to take, but only a condition of its exercise. Whenever public uses require, the government may appropriate any private property on the payment of just compensation. That the supply of water to a city is a public purpose cannot be

doubted, and hence the condemnation of a water supply system must be recognized as within the unquestioned limits of the power of eminent domain. It matters not to whom the water supply system belongs, individual or corporation, or what franchises are connected with it—all may be taken for public uses upon payment of just compensation. It is not disputed by counsel that, were there no contract between the company and the town, the water works might be taken by condemnation. And so the contention is practically that the existence of the contract withdraws the property, during the life of the contract, from the scope of the power of eminent domain, because taking the tangible property will prevent the company from supplying water, and, therefore, operate to relieve the town from the payment of hydrant rentals. In other words, the prohibition against a law impairing the obligation of contracts stays the power of eminent domain in respect to property which otherwise could be taken by it. Such a decision would be far reaching in its effects. There is probably no water company in the land which has not some subsisting contracts with a municipality which it supplies, and within which its works are located, and a ruling that all those properties are beyond the reach of the power of eminent domain during the existence of those contracts is one which, to say the least, would require careful consideration before receiving judicial sanction. The fact that this particular contract is for the payment of money for hydrant rental is not vital. Every contract is equally within the protecting reach of the prohibitory clause of the Constitution. The charter of a corporation is a contract, and its obligations cannot be impaired. So it would seem to follow, if plaintiff-in-error's contention is sound, that the franchises of a corporation could not be taken by condemnation, because thereby the contract created by the charter is impaired.

The privileges granted to the corporation are taken away, and the obligation of the corporation to perform is also destroyed.

"The vice of this argument is twofold. **First, it ignores the fact that the contract is a mere incident to the tangible property; that it is the latter which, being fitted for public uses, is condemned. And while the company, by being deprived of its tangible property, is unable to perform its part of the contract, and therefore can make no demands upon the town for performance on its part, it still is true that the contract is not the thing which is sought to be condemned, and its impairment, if impairment there be, is a mere consequence of the appropriation of the tangible property.** Second, a contract is property, and, like any other property, may be taken under condemnation proceedings for public use. New Orleans Gas Co. *vs.* Louisiana Light Co., 115 U. S. 650, 673. Its condemnation is of course subject to the rule of just compensation, and that is all that is implied in the decisions such as Hall *vs.* Wisconsin, 103 U. S. 5, cited by counsel."

See also Elliot on Roads and Streets (2 Ed.), Secs. 216, 223 *et seq.* and cases cited. 3 Dillon Municipal Corp. (5 Ed.) Sections 1023-27, pages 1619-26. 2 Lewis Em. Domain (3d Ed.) 448 *et seq.*

EXEMPTION FROM TAXATION.

It is conceded that where a Legislature contracts with a corporation that exemption from taxation may be allowed the corporation, no succeeding Legislature has power to pass a law impairing the obligation of the contract by a repeal of such exemption without compensation, but counsel for the appellants confuse the principle of law laid down in the tax exemption cases with the principles applicable to the exercise of the power of eminent domain. In every case cited by appellants no provision for compensation for the taking was made.

With regard to the question of the difference between taxation and eminent domain, in the case of the State Bank of Ohio *vs.* Knoop, 16 Howard 369, one of the cases quoted in Appellant's Brief, Justice McLean, in delivering the opinion of the Supreme Court of the United States, said:—

> **"The power of taxation has been compared to that of eminent domain, and it is said as regards the question before us, that they are substantially the same. These powers exist in the same sovereignty but their exercise involves different principles. Property may be appropriated for public purposes, but it must be paid for. Taxes are assessed on property for the support of the government under a legislative act."**

It is undoubtedly true that in the so-called tax exemption cases, this Court has held certain contracts existing between the State and the taxpayers as binding upon the State, to the extent that subsequent Legislatures have been forbidden to take away the exemption from taxation. It is, however, submitted that these cases are authority for no more than they specifically decide, and even in regard to the very point involved there has been much doubt expressed as to the propriety of the doctrine, though it may be justified on the theory of a commutation; that the State having received at once the proceeds or the consideration for the future exemption, may not equitably resume the right to tax, unless indeed the privilege of exemption so paid for shall be condemned and compensated by the power of eminent domain. In Washington University *vs.* Rouse, 8 Wallace 439, quoted in the Brief of the plaintiff-in-error, for instance, these words appear in the dissenting opinion:—

> "We are strengthened in this view of the subject by the fact that a series of dissents * * * shows that it has never received the full assent of this Court; and referring to these dissents for more elab-

orate defense of our views we content ourselves with thus renewing our protest against a doctrine which we think must finally be abandoned."

So far as the writer is aware, no effort appears to have been made at any time to authorize the condemnation of a statutory exemption from taxation with proper appraisal of the value of such exemption and compensation therefor. On principle, however, there would seem to be no objection to such a compensated taking; and it is clear that the decisions quoted had in view merely the repeal or annulment of the immunity previously granted, without payment for the deprivation. The language used by the Courts must accordingly be read without losing sight of its application to those conditions.

POLICE POWERS.

For the single purpose of illustration, we refer to some of the cases arising under the police power of the State or its subordinate agencies, a power similar to that of eminent domain in many respects, yet differing widely therefrom.

It has been held that the police power, like the power of eminent domain, cannot be abdicated or bargained away; that is it is inalienable even by express grant; that all contracts and property rights are held subject to its exercise; that this is irrespective of whether or not a consideration was paid for the surrender; and that the enforcement of uncompensated obedience to legitimate police regulation is not a taking of property without compensation or without due process of law. Chicago & Alton R. R. *vs.* Tranbarger, 238 U. S. 67 (1914).

See also NORTHERN PACIFIC RAILWAY COMPANY *vs.* STATE OF MINNESOTA, 208 U. S. REPORTS 583, which held:—

"The right to exercise the police power is a continuing one that cannot be limited or contracted

away by the State or its municipality, nor can it be destroyed by compromise as it is immaterial upon what consideration the attempted contract is based.

"The exercise of the police power in the interest of public health and safety is to be maintained unhampered by contracts in private interests, and uncompensated obedience to an ordinance passed in its exercise is not violative of property rights protected by the Federal Constitution: *Held*, That an ordinance of a municipality of that State, valid under the law of that State as construed by its highest Court, compelling a railroad to repair a viaduct constructed after the opening of the railroad, by the city in pursuance of a contract relieving the railroad, for a substantial consideration, from making any repairs thereon for a term of years was not void under the contract, or the due process clause of the Constitution."

POLICE POWER, EMINENT DOMAIN, AND TAXATION CONTRASTED.

So therefore we have three governmental powers:—

POLICE POWER—where even *uncompensated* obedience may be enforced; and this though an attempt has been made to bargain away the power or to alien it by express grant.

EMINENT DOMAIN—where private property may be condemned for public use *upon just compensation being made* and this too where a contract exists that the power shall not be exercised, for the contract too may be taken and paid for.

TAXATION—in which it appears that a contract of exemption is binding on the State, and may not be taken away, at least without compensation.

But it is of the greatest importance in the consideration of these various subjects that they be not confused and

that the principles involved in each one of them be applied to the circumstances arising therein.

The vice of the argument of the counsel for the appellants is that they confuse the questions of taxation and eminent domain. They quote as properly supporting their argument in this case, which is purely one arising under the exercise of the power of eminent domain, many cases on the subject of taxation &c., &c.

The difference is obvious. In the tax exemption cases the effort was to rescind without compensation a legislative grant. In the present instance it is desired to take for the use of the community upon due payment for it, what at most is a contract, after ascertaining its value, just as any other contract or any other form of property would be appraised, taken and paid for. Taxation itself deprives the property owner of something without payment because such is the purpose and need of the power levying the tax; whereas eminent domain takes from him nothing at all; it simply changes the form of his property, substituting in his hands money for the tangible or intangible thing transferred to the sovereign; for houses or lands, for personal property, for charters, franchises, contracts, or choses in action, as the case may be.

On the distinction between the doctrines relating to tax exemption and those relating to eminent domain, see 4 Dillon Munic. Corp. (5 Ed.) section 1353 (pages 2318-19) and cases cited in note 1 to that section. 1 Lewis Eminent Domain (3rd Ed.), section 4, pages 8-16 and note 16.

We again refer to the principle laid down by Judge Thayer *in re* opening of Twenty-second Street (*supra*):—

> **"A contract is property, but it is no more sacred than other property. Its obligation is not impaired, but is recognized when compensation is provided for its infringement."**

As was said in West Bridge Co. *vs.* Dix, *supra*:—

> "There enter conditions which arise not out of the literal terms of the contract itself * * * they

> are alway presumed * * * and need never therefore to be carried into ex[illegible]ss stipulation, for this could add nothing to their force. *Every contract* is made *in subordination* to them. Such a condition is the right of eminent domain."

And in The City of Cincinnati *vs.* Louisville &c., *supra*:—

> "The constitutional inhibition upon any *State law impairing the obligation of contracts is not a limitation upon the power of eminent domain.* The obligation of a contract is not impaired when it is appropriated to a public use and compensation made therefor."

It thus appears that the constitutional provisions relating to the impairment of the obligation of contracts *do not extend to takings thereof under the assertion of the power of eminent domain.*

Eminent domain properly proceeded with recognizes the obligation; does not impair it.

Plaintiff-in-error admits that the Act of 1854 did not constitute a complete surrender of the right of eminent domain and it in no manner deprives either the State or the City from condemning or taking over the *entire tract* belonging to the hospital but insists that the State agreed not to cut this tract with streets and that there remains a binding contractual relation which cannot be assailed.

Of course the plaintiff-in-error paid for the entire tract and holds it in fee simple under a contract binding on the State. But on the authority of the foregoing we submit that the contract (if it is one under the Act of 1854), as well as the title by which the land is held must be read as if there were written therein the words "Subject however to the exercise of the power of eminent domain."

MANY SIMILAR STATUTES ARE IN EXISTENCE.

It would, indeed, be a serious evil to the City of Philadelphia and other urban communities should it now be found that exemptions from the power of eminent domain such as the one in question in this case, are fastened on the people forever. Many similar acts of the legislature, antedating the present Constitution, still survive; and if the contentions of the plaintiff-in-error are tenable each of these must be suffered to subsist to all eternity, or until the owners of the property to which they pertain voluntarily relinquish them, barring the progress and development of this and the other great cities of the State. In the meanwhile, since the passage of these early Acts, conditions have wholly changed and localities which were then rural or, at best, suburban, have become the scenes of great and thriving activity. The acts of assembly granting these exemptions were passed at a time when the legislators did not dream that population would ever press urgently, or that public travel would require the use of numerous streets and highways, in the localities affected. This, however, has come to pass in the progress of events and the unending continuance of these immunities, blocking off and severing, as they do, the various sections of the City, would be a dire calamity. It is most fortunate that neither law nor reason requires the conclusion that such a blight, existing in the various centers of this and other municipalities, and in the lines of their natural growth, has become a permanency which is beyond the power of remedy or recall.

SUMMARY AND CONCLUSION.

CONSIDERATION OF THE FOREGOING SHOWS:

1. One Legislature cannot grant away the State's right of eminent domain so as to bind future Legislatures.

2. A general law will repeal prior legislation granting special privileges or making special agreements.

3. A contract cannot bind the State not to exercise the power of eminent domain. The contract right is itself subject to the exercise of the power of eminent domain.

4. And a lawful public use lying at the foundation of the right to appropriate property, if such lawful public use exists no contract not to apply the property to such use is of any avail against the sovereign's power to so apply it on making compensation.

5. Admitting that the State may not violate its contract, nevertheless when the public necessity requires, it may condemn the property rights growing out of such contract. And the condemnation of the land and contract rights may be had in the same proceeding. Such a course was agreed upon by these parties and held to be correct and proper by the Court (Sulzberger, J.), in the proceedings sought to be enjoined.

Therefore, we submit the following propositions are established:—

First.—The Act of 1854 was not a binding and irrepealable contract between the parties; it was either *ultra vires* and void *ab initio*, or voidable and subject to amendment or repeal by any subsequent Legislature, and probably by the same Legislature which enacted it.

Second.—Whatever its force and effect, the said contract is but property and subject to condemnation and

appropriation as is all other property. The proceedings in the Quarter Sessions as amended under the agreement of the parties, and the bond entered therein as "required by law" afford to the plaintiff all the protection to which it is legally entitled; and that a conclusion sustaining either of the said propositions, viz:—

That the plaintiff has no existing rights under the Act of 1854, or

That if it has they are subject to condemnation and are protected under the proceedings in the Quarter Sessions—which furnish the appellants a full and adequate remedy at law—must result in the affirmance of the decree of the Court below.

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